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Supreme Court, U.S.
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MAY 12 1987
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

No. _____

CHARLES D. TRAVIS, ET UX AND WILLIAM V. TRAVIS, ET UX, Petitioners

VERSUS

THE STATE OF TEXAS, ET AL, Respondents

Petition For Writ of Certiorari To The United States Supreme Court from the Supreme Court of Texas

MOORE, LANDREY, GARTH & JONES
BRACK JONES, JR.
State Bar No. 10975000
FLOYD A. LANDREY
State Bar No. 11866000
285 Liberty, Suite 1900
Beaumont, Texas 77701
(409) 835-3891

ATTORNEYS FOR PETITIONERS

QUESTIONS PRESENTED FOR REVIEW

I. Whether or not in a condemnation proceeding (partial taking), the Trial Court's exclusion of owners' evidence of lost rental income constituted a taking without just compensation?

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2. The State of Texas, et al vs. Charles D. Travis, et al, No. 09-85-00246-CV (9th Court of Appeals, June 5, 1986) Motion for Rehearing Denied (June 25, 1986).

3. The State of Texas, et al vs. Charles D. Travis, et al, No. 46,969 (County Court at Law, Jefferson County, July 19, 1985).

4. The State of Texas, et al vs. Charles D. Travis, et al, No. 46,969 (Special Commissioners Award, Oct. 14, 1983).

JURISDICTION

Jurisdiction to review the judgment of the Supreme Court of Texas in this case, dated January 14, 1987, rehearing denied February 18, 1987 is conferred upon this Honorable Court by 28 U.S.C. Section 1257(3).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The following constitutional and statutory provisions which the case involves

are set forth, verbatim, in the Supplemental Appendix, pp. A/63 - A/64:

> United States Constitution, Amendment V.
>
> United States Constitution, Amendment XIV, Section 1.
>
> Texas Constitution, Article 1, Section 17.

STATEMENT OF THE CASE

This is a Petition resulting from a Texas condemnation proceeding.

Charles D. Travis and his wife, and William V. Travis and his wife, were the owners of certain real property and buildings. Hereafter, they are called "Owners"

At trial, the State of Texas and the City of Beaumont, Texas, recovered title and possession of a tract of land located in Beaumont, Texas, as well as the ownership, possession and title to certain buildings thereof. The condemnation involved a partial taking, rather than a total taking.

The property of the Owners or the condemnees was situated on Railroad Avenue where same intersects with Washington Boulevard in Beaumont, Texas. In approximate terms, twenty-five (25) feet on the street side of the Owners' property was taken. All of Building #1 wherein the Owners conducted their family business, as well as all of

Building #3, which was used for storage, was taken. However, only about 2.4 to 2.6 feet of the Owners' building designated as Building #2 was taken. At times material to this condemnation proceeding, Building #2 was utilized by Owners' lessee as a place of business. The date of taking the property by the State was October 28, 1983.

A panel of Special Commissioners was appointed to hear the case and their award was dated October 13, 1983. The State objected to such award and a trial of the case to a jury in the County Court at Law of Jefferson County, Texas, followed with judgment being entered on July 19, 1985. Owners appealed that judgment to the Ninth District Court of Appeals, Beaumont, Texas, and that Court reversed and remanded the cause back to the Trial Court on June 5, 1986 (Appendix pp. A/48 - A/50). The State filed its Motion for Rehearing which was overruled on June 25, 1986.

The State filed its Petition for Writ of Error with the Supreme Court of Texas and on January 14, 1987, that Court reversed the decision of the Court of Civil Appeals, Ninth District. Owners filed their Motion for Rehearing which was overruled on February 18, 1987.

ARGUMENT

Prior to the date of taking (October 28, 1983), the State, on numerous occasions, contacted Owners' lessee concerning relocation and in fact, relocated such lessee. In 1980, lessee was contacted at his premises by a representative of the State concerning relocation of his business. The State paid lessee's relocation expenses. Lessee was told if he moved then or soon, he would receive relocation assistance and if he waited until the property was condemned, he would not qualify for those relocation expenses. Lessee did not contact the State and the first he was aware of the relocation program was from the State. This condemnation was a partial taking of the

Owners' land and a partial taking of certain buildings located on the realty taken.

The State alleged it was utilizing its authority under Title 42 U.S.C. Section 4601 et. seq., 42 U.S.C. Section 4627, Sec. 21.406 of the Texas Property Code and Regulations 500.01, 500.02, 540.01 and 540.02 of certain rules and regulations of the Texas Department of Highways and Public Transportation, when it relocated (prior to the date of taking) Owners' lessee and granted relocation assistance and made relocation payments.

At trial, prior to the jury selection, the Court sustained the State's Motion in Limine, and excluded Owners' evidence of lost rental income. Owners, by Bill of Exceptions, properly developed and tendered its lost rental income evidence. From the Bill of Exceptions, it was specifically shown that twenty-nine (29) months at $1,000.00 per month was raised by the excluded evidence, together with interest, amounting to $33,450.00.

The Texas Court of Appeals, Ninth District, in its opinion, determined the jury should have been permitted to hear that evidence, (Appendix, pp. A/31- A/47). Among other findings, that Court found there was a physical invasion of Owners' property by the State and that Owners' rentals were definite, fixed and quoted from the case City of LaGrange vs. Pieratt, 142 Tex. 23, 175 S.W.2d 243 (Tex. 1943), as follows:

> "For it to be considered that damages are to property, it is not necessary that such damages are to be measured by the extent of injury to the physical property itself. 'A right of recovery is established by proof of injury to some right of property, and the damages are measured by the extent of the injury to that right. Thus a business is property, and the reasonable damages for interference with the access to business property may be measured. . .by the loss of profits.' 16 Tex. Jur. pp. 976-978, and authorities there cited; Hart Bros. vs. Dallas County, Tex. Com. App., 279 S.W. 1111.
>
> "In a proceeding for the condemnation of a part of a tract of land for street or road purposes, it is presumed that the amount of damages allowed covers all lawful elements of damages, whether direct or consequential, that could reasonably have been foreseen and determined at the

time of condemnation; and where a part of a tract of land is condemned for street or road purposes, the owner cannot recover in a subsequent proceeding for consequential damages to the remainder of the land which he ought reasonably have foreseen and presented in the condemnation proceeding. State vs. Brewer, et ux, Tex. Sup. 169 S.W.2d 469. In this connection, we think that where a part of a tract of land is condemned for street or road purposes, and the owner claims consequential damages to the land left, on account of the loss of profits arising from an established business being conducted thereof, while the road or street improvements are in progress, such claim may and should be presented at the condemnation proceeding, if it is of such a nature that it could reasonably have been foreseen and determined at the time. State vs. Brewer, supra, 16 Tex. Jur., p. 954, and authorities there cited.

"It is the law that where a breach of contract or a tort results in damages to an established business, in the form or loss of profits, which would have been derived therefrom absent such a breach of contract or tort, the owner of such business may recover damages from the party causing such loss, measured by the amount of such loss of profits. 28 Tex. Jur. p. 215, sec. 114, and authorities there cited. We have already shown that the same rule applies in condemnation proceedings. In such proceedings, an established business is property, and damages thereto in the form of loss of profits should be taken into consideration in such proceedings.

"Profits which would have been earned by an established business, absent any interference therewith, are

in their very nature more or less conjectural, uncertain, and speculative, but this does not deprive the party injured by such interference of his right to recover. In other words, the difficulties which may lie in the way of making proof will not defeat a recovery. It is not necessary that damages in the form of loss of profits should be susceptible of calculation. All that is required is that they be ascertained with a reasonable degree of certainty. 13 Tex. Jur. p. 207, sec. 108, and authorities there cited.

"Measured by the above rules, we think that Pieratt has a perfect right to present his expected loss of profits, as an element of consequential damages to his property, in the condemnation proceedings above mentioned. Since he had such right, we think it follows, as a matter of course, that it was his duty so to do. . .

". . .As already stated, the amount of damages such as these is always more or less uncertain, conjectural, and speculative; but that does not prevent their presentation and adjudication in a condemnation proceeding. As to such damages, the law does not require that the amount of damages be certainly or definitely proved."[1]

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[1] It is contemplated that the State will cite State vs. Vaughan, 319 S.W.2d 349 (Tex. Civ. App. - Austin 1959, no writ) as authority for the proposition that the State is not liable for the lost rental occasioned an owner resulting from a tenant vacating the property voluntarily, having heard of the condemnation. That case is to be distinguished from the facts herein in that State vs. Vaughan, supra (a) is a whole taking of property and (b) no physical invasion by the State occurred.

In determining fair market value and just compensation, rents and profits are admissible as an element of the evidence. Westchester County Park Commission, et al vs. United States, 143 F.2d 688 (2d Cir. 1944), United States vs. 1.16 Acres, More or Less, in the City of Stamford, County of Fairfield, State of Connecticut, 300 F. Supp. 1021 (D.C. Conn. 1969), City of Beaumont vs. Kinnard, 533 S.W.2d 481 (Tex. Civ. App. - Beaumont 1976, R.N.R.E.) and Nichols, LAW OF EMINENT DOMAIN, Vol. 5, Section 19.01[1], 1985. It is expected the State will cite cases wherein evidence of lost rental income is admissible when "not asserted as a separate item of damages" and only as affecting market value. Milam vs. Akers, 181 S.W.2d 719, 722 (Tex. Civ. App. 1944, writ ref'd w.o.m.) and City of Dallas vs. Prioli, 242 S.W.2d 176, 179 (Tex. 1951). The Supreme Court utilized this reasoning in its opinion and found Owners sought to introduce the evidence as a separate measure of damages. Owners submit

this reasoning was unfounded. Owners' evidence was prevented by the States' Motion in Limine. The State's Motion in Limine (Appendix p. A/3) and its Brief in support thereof (Appendix p. A/7) show clearly the State's position. The Motion in Limine clearly points out "The matter set out would be inadmissible as evidence for any purpose..." and has "no bearing on the issues in the case". If Owners had been seeking to introduce this evidence as a separate measure of damage, special issues would have been necessary. No special issues on the rental income as a separate damage element were requested. Accordingly, Owners' submission of lost rental income evidence sought to bring that issue to the jury as same related to the value of the land taken and the extent of damages to the land remaining, and should have been considered by the jury.

Owners submit under the City of LaGrange, supra, case, the initial contact and removal by the State of Owners' lessee

was an invasion and/or breach of contract and tort; accordingly; such evidence should have been considered by the jury. Currently, representatives of the State in this and other cases are, by State and Federal authority, removing lessees in advance of the taking date and paying their expenses. The State takes the position that Owners may not then present evidence as to lost rentals occasioned thereby and such position prevents the receipt of just compensation by owners.

Further, the exclusion from the jury of the Owners' lost rental income evidence constituted a taking without just compensation under Article 1, Section 17 of the Texas Constitution, and the United States Constitution, Amendments V and XIV.

CONCLUSION

For the reasons mentioned above, judgment of the Supreme Court of Texas should be reversed and the Petition granted.

Respectfully submitted,

MOORE, LANDREY, GARTH & JONES
285 Liberty, Suite 1900
Beaumont, Texas 77701
(409)835-3891

By: _____
BRACK JONES, JR.
State Bar No. 10975000

By: _____
FLOYD A. LANDREY
State Bar No. 11866000

ATTORNEYS FOR PETITIONERS

CERTIFICATE OF SERVICE

I hereby certify that on this 8TH day of May, 1987, three copies of the above and foregoing Writ of Certiorari have been forwarded to each of the following individuals:

Mr. Tyrone Cooper
Assistant City Attorney
P. O. Box 3827
Beaumont, Texas 77704

Mr. John M. Schiltz
Hon. Jim Mattox, A.G.
Office of the Attorney General
P. O. Box 12548, Capitol Station
Austin, Texas 78711

_____
BRACK JONES, JR.

A P P E N D I X

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DOCKET NO. 46969

STATE OF TEXAS, ET AL	§	IN THE COUNTY COURT
	§	
VS.	§	
	§	OF JEFFERSON COUNTY,
CHARLES D. TRAVIS,	§	
ET UX AND WILLIAM V.	§	
TRAVIS, ET UX	§	TEXAS, AT LAW

MOTION IN LIMINE

TO THE HONORABLE JUDGE OF SAID COURT:

The State of Texas, et al, Movant, makes this motion to the Court to enter an order prior to the voir dire examination of the jury panel, that opposing counsel, and through opposing counsel any and all witnesses called on behalf of opposing parties, be instructed to refrain from any mention or interrogation, directly or indirectly in any manner whatsoever, including the offering of documentary evidence, concerning the matter set forth herein. In this connection, Movant requests the Court to order, if opposing counsel wishes to propose a theory of admissibility concerning these matters, that opposing counsel first must request a ruling from the Court outside the presence and hearing of all

prospective jurors and jurors ultimately selected in this cause. In support of this motion, Movant shows the following:

I.

The matter set our would be inadmissible as evidence for any purpose on proper and timely objection and that they have no bearing on the issues in this case or the rights of the parties to this suit.

II.

Permitting interrogation of witnesses, comments to jurors or prospective jurors, or offers of evidence concerning any of the matters set forth would prejudice the jury, and sustaining objections to such questions, statements or evidence introduced by counsel or witnesses will not prevent prejudice, but will reinforce the development of questionable evidence.

III.

The following matters would not be admissible for any purpose in this cause:

Any evidence or allusion by the defendants relating to any loss of income or rents by reason of loss in

rentals or reduction in rental income as a result of the impending condemnation of defendants' property by plaintiffs.

References to the filing of this Motion in Limine or to any ruling by the court in responds to this motion. Such references are inherently prejudicial in that they suggest or infer that the movant has sought to prohibit proof or that the court has excluded proof of matters damaging to movant's case.

WHEREFORE, the State of Texas, et al, Plaintiffs~~,~~ request that this court enter an order as follows:

That counsel for Charles B. Travis, et ux and William V. Travis, et ux, Defendants, and through him any and all witnesses called on behalf of Defendants, be and are instructed to refrain from any mention or interrogation, directly or indirectly, in any manner whatsoever, regarding any of the matters set forth in such motion, including the offering of documentary evidence, without first requesting and obtaining a ruling from the court outside the presence and hearing of all prospective jurors and jurors ultimately selected in this cause in regard to any

alleged theory of admissibility of such matters.

Respectfully submitted,

/s/Tyrone E. Cooper
Tyrone E. Cooper
Assistant City Attorney
P. O. Box 3827
Beaumont, Texas 77704
(409)838-0761
State Bar No. 04783900

ATTORNEY FOR PLAINTIFFS

CERTIFICATE OF SERVICE

This is to certify that the above and foregoing Motion in Limine has been served on Floyd Landrey, attorney for record for Charles B. Travis, et ux, and William V. Travis, et ux, by hand delivery of a true copy of said motion as his offices at 285 Liberty Street, Beaumont, Texas, 77701, on the 28th day of June, 1985.

/s/Tyrone E. Cooper
Tyrone E. Cooper
Attorney for Plaintiffs

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STATE OF TEXAS, ET AL	§	IN THE COUNTY COURT
	§	
VS.	§	
	§	OF JEFFERSON COUNTY,
CHARLES D. TRAVIS,	§	
ET UX AND WILLIAM V.	§	
TRAVIS, ET UX	§	TEXAS, AT LAW

BRIEF IN SUPPORT OF
MOTION IN LIMINE

TO THE HONORABLE JUDGE OF SAID COURT:

The State of Texas and the City of Beaumont, plaintiffs, have filed a Motion in Limine respectfully requesting this court to instruct the Defendant, his counsel and any witnesses appearing on behalf of the Defendant not to mention, allude to or refer in any manner during the trial of this case to any loss of income by reason of loss in rentals or reduction in rental income as a result of the impending condemnation of defendants' property by plaintiffs.

The State of Texas and the City of Beaumont, plaintiffs, assert that this type of evidence should be excluded. The mere fact that tenants learned of contemplated condemnation and, because of such

information, elected to vacate the property does not afford the owner the right to recover damages from the State, since there has been neither a taking nor any character or physical invasion of the property. State v. Vaughan, 319 S.W.2d 349 (Tex. Civ. App.-Austin 1959, no writ); Naumann v. Urban Renewal Agency of City of Austin, 411 S.W.2d 803 (Tex. Civ. App.-Austin, 1967, ref. n.r.e.).

In State v. Vaughan, supra, the reaffirmed its earlier ruling in Parrish v. State, 310 S.W.2d 709 (Tex. Civ. App.-Austin, 1958) that the introduction into evidence of a letter written by the State notifying the owners of the intent to take the property which the owners alleged resulted in loss of rents to defendant was error. The Court further stated that the loss of tenants and the resulting loss of rentals was, in any event, incidental or consequential to the taking of the entire property by the State and for which reason the State is not liable for such

consequential damage. The Austin Court of Civil Appeals in Naumann v. Urban Renewal Agency of City of Austin, supra, citing State vs. Vaughan, supra, held that the trial court correctly sustained appellees Motion in Limine to suppress any evidence or allusion by appellant relating to any loss of income by reason of loss in rentals or reduction in rental income as a result of the impending condemnation of appellant's property by appellee.

Considering the above, the State of Texas and the City of Beaumont contends that the position taken is supported by the several courts in this state which have addressed this issue and have held that it is proper to exclude evidence of any loss of income by reason of loss in rentals or reduction in rental income as a result of the impending condemnation of property.

Respectfully submitted,

/s/Tyrone E. Cooper
Tyrone E. Cooper
Attorney for Plaintiffs

CERTIFICATE OF SERVICE

This is to certify that the above and foregoing brief in support Motion in Limine has been served on Floyd Landrey, attorney for record for Charles B. Travis, et ux, and William V. Travis, et ux, by hand delivery of a true copy of said motion as his offices at 285 Liberty Street, Beaumont, Texas, 77701, on the 28th day of June, 1985.

/s/Tyrone E. Cooper
Tyrone E. Cooper
Attorney for Plaintiffs

DOCKET NO. 46969

STATE OF TEXAS, ET AL	§	PROCEEDINGS IN
	§	EMINENT DOMAIN
VS.	§	
	§	COUNTY COURT OF
CHARLES D. TRAVIS,	§	JEFFERSON COUNTY,
ET UX AND WILLIAM V.	§	
TRAVIS, ET UX	§	TEXAS AT LAW

AWARD OF SPECIAL COMMISSIONERS

On the 12th day of October, 1983, in the City of Beaumont, Jefferson County, Texas, the above styled Proceedings in Eminent Domain came on to be heard before the undersigned three disinterested freeholders of Jefferson County, Texas, heretofore appointed as Special Commissioners by the Judge of the County Court at Law of Jefferson County, Texas, to assess the damages caused by these Proceedings, and came the Plaintiffs, the State of Texas and the City of Beaumont, a municipal corporation situated in Jefferson County, Texas both acting herein by and through said City and its duly authorized attorney of record, and came also the Defendants, Charles D. Travis and wife, Anne Lois Travis and William V. Travis and wife, Delores T. Travis, acting by and

through their duly authorized attorney of record, and came the State of Texas and County of Jefferson, the City of Beaumont and the South Park Independent School District, claimants by virtue of taxes which have been accrued; and all parties having announced ready, the Commissioners proceeded to hear evidence and arguments of the parties, and made the following findings:

I.

That on the 11th day of May, 1983, the State of Texas and the said City of Beaumont, Plaintiffs, filed a written statement with the Judge of the County Court of Jefferson County, Texas, wherein upon the facts and for the purposes therein stated, they sought judgment vesting in the State of Texas fee simple title to certain land, for highway right of way purposes, save and except all the oil, gas and sulphur beneath said land, with no right remaining in the owner or owners of said oil, gas or sulphur of ingress or egress to or from the surface of said land for the purpose of exploring, developing,

drilling or mining of same, sail land described in Exhibit "A" attached hereto and made a part hereof for all purposes, situated within the corporate limits of the City of Beaumont, Jefferson County, Texas:

That upon consideration of said written statement so filed by Plaintiffs, the Judge of the County Court of Jefferson County, Texas, did on the 11th day of May, 1983, appoint Tom Hare, Eugene Lefler and Dick Cantella, three distinguished freeholders of Jefferson County, Texas, as Special Commissioners to assess the damages caused by the taking of said property.

III.

That thereafter said Special Commissioners duly qualified as such, each taking the oath prescribed by law, which oaths are on file with the papers in this cause.

IV.

That after having so qualified, said Special Commissioners on the 7th day of September, 1983, by written order bearing

said date, designated and appointed the 12th day of October, 1983, at 9 o'clock a.m. at the City Council Chambers in the City of Beaumont, Jefferson County, Texas, as the date and place for hearing said statement and parties, said date being the earliest practical time and such place being in the County in which the land or a part thereof is situated.

V.

That on the 7th day of September, 1983, said Special Commissioners issued written notice of such date and place of hearing and the Defendants, Charles D. Travis and wife, Anne Lois Travis, and William V. Travis and wife, Delores T. Travis, acting by and through their attorney of record, waived issuance and service of notice; and the City of Beaumont, claimant by virtue of taxes which have accrued, whose agent for service is Nick Lampson; the South Park Independent School District, claimant by virtue of taxes which have accrued, whose agent for service is Jack Devine; the State of Texas and County

of Jefferson, claimants by virtue of taxes which have accrued, whose agent for service is Nick Lampson; have duly and properly waived issuance and service of notice of the time and place of hearing.

VI.

That on the 12th day of October, 1983, said Special Commissioners did convene and the following named parties appeared in person and by their attorneys: The State of Texas and the City of Beaumont appeared by and through Tyrone E. Cooper, Assistant City Attorney; Charles D. Travis and wife, Anne Lois Travis, and William V. Travis and wife, Delores T. Travis, appeared by and through Floyd Landrey, Attorney at Law; and appeared the State of Texas, County of Jefferson, the City of Beaumont, and the Beaumont Independent School District, claimants by virtue of taxes which have accrued. The parties announced ready for such hearing, and said Special Commissioners proceeded to hear evidence as to the damages which will be sustained by the owner or owners by reason of

the taking of said land, and after hearing and considering such evidence, said Special Commissioners did fine and determine and accordingly assess damages to be paid by the State of Texas and the City of Beaumont, according to the rules of damages set forth in Article 3265, Revised Civil Statutes of Texas, in the total amount of ONE HUNDRED SIXTY THOUSAND DOLLARS ($160,000.00); and that the foregoing sum should be apportioned among the Defendants as follows:

(a) To the fee owners, Charles D. Travis and wife, Anne Lois Travis, and William V. Travis and wife, Delores T. Travis, the sum of $159,377.61.

(b) To the City of Beaumont, the State of Texas, the County of Jefferson, claimants by virtue of taxes which have accrued, the sum of $210.49.

(c) To the South Park Independent School District, claimant by virtue of taxes which have accrued, the sum of $411.90.

The costs of this proceeding are adjudged against the Plaintiffs.

Rendered this 13th day of October, 1983.

/s/Tom Hare
Tom Hare

/s/Eugene Lefler
Eugene Lefler

/s/Dick Cantella
Dick Cantella

SPECIAL COMMISSIONERS

The foregoing Award of Commissioners was filed with me on the 14th day of October, 1983. After consideration, it is ORDERED that each Commissioner receive the sum of $175.00 for his services in this Proceeding.

/s/George Buford
Judge of the County Court of
Jefferson County, Texas, at Law

DESCRIPTION

Being 0.1437 acre of land, more or less being out of and a part of that certain tract of land in the David Brown League, Abstract No. 5, in the City of Beaumont, Jefferson County, Texas, said tract of land conveyed to Charles D. Travis by Deeds dated January 15, 1952 and June 2, 1960 and recorded in Volume 843, Page 189 and Volume 1222, Page 241 Deed Records, Jefferson County, Texas, said 0.1437 acre tract being more particularly described by metes and bounds as follows:

Commencing at the Southeast corner of said grantor's tract of land, said corner also being the Northeast corner of a 0.0293 acre tract belonging to Entex, Inc., which is recorded in Volume 1646, Page 286 of the Deed Records, Thence S 76° 30' 12.70" W along the South line of said grantor's tract and North line of said 0.0293 acre tract belonging to Entex, Inc., a distance of 67.98 feet to the POINT OF BEGINNING of the tract herein conveyed:

THENCE N. 41° 54' 28.44" W along the proposed East right of way line of Spur 380, a distance of 257.20 feet to a point for corner in the North line of said grantor's tract:

THENCE S 48° 05' 31.56" W along the said North line, a distance of 25.00 feet to a point for corner in the existing East right of way line of Spur 380:

THENCE S 41° 54' 28.44" E along the existing East right of way line of Spur 380, a distance of 243.68 feet to a point for corner in the South line of said grantor's tract:

THENCE N 76° 30' 12.70" E along the said South line, a distance of 28.42 feet to the POINT OF BEGINNING.

EXHIBIT "A"

AND IN ADDITION THERETO:

Title to all that Commercial Building No. 1 and Commercial Building No. 3 located partially on the remaining property of which the above described property was originally a portion, said Building No. 1 being traversed by the first call of the above metes and bounds description, which call enters the south side of said Building No. 1 three feet east of the interior southwest corner of said Building No. 1 and leaves said Building No. 1 on the north side, fifty-one and five tenths feet west of the northeast corner thereof, and said Building No. 3 being traversed by the first call of the above metes and bounds description, which call enters the south side on Building No. 3 two and three tenths feet east of the southwest corner of said Building No. 3 and leaves said Building No. 3 on the north side, eighteen feet west of the northeast corner thereof, with the result that the portion of said Building No. 1 and Building No. 3 lying east of said call would be in such condition that it could not be adequately reconstructed at such location; plus the temporary right to enter upon the property remaining, of which the above-described premises were originally a portion, for the sole purpose of removing all of said Commercial Building No. 1 and No. 3.

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	§	COUNTY COURT OF
CHARLES D. TRAVIS,	§	JEFFERSON COUNTY,
ET UX AND WILLIAM V.	§	
TRAVIS, ET UX	§	TEXAS AT LAW

JUDGMENT

BE IT REMEMBERED that on the 1st day of July, 1985 there came on to be heard the above-styled and numbered cause, wherein the State of Texas and the City of Beaumont are Plaintiffs and Charles D. Travis, et ux and William V. Travis, et ux, are Defendants, and the City of Beaumont, the South Park Independent School District, the State of Texas, and the County of Jefferson, as claimants by virtue of taxes which have accrued, are also Defendants; and there upon came the Plaintiffs by and through their attorney of record and announced ready for trial, and came the Defendants, Charles D. Travis, et ux and William V. Travis, et ux by and through their attorney of record and announced ready for trial, and came the

remaining Defendants by and through their respective tax collectors; and

Thereupon, came a jury of six (6) qualified jurors who, being duly selected, empaneled and sworn, heard the evidence and arguments of counsel upon the Special Issues submitted in the Charge of the Court, retired to consider their verdict, and on the 3rd day of July, 1985, returned in open court their verdict as follows, to-wit:

"SPECIAL ISSUE NO. 1

What do you find from a preponderance of the evidence was the fair market value on October 28, 1983, of the land, together with the commercial buildings and other improvements, condemned by the State for widening the State Highway, Spur 380?"

"Answer in dollars and cents."

"ANSWER: $71,067.00"

"SPECIAL ISSUE NO. 2

"What do you find from a preponderance of the evidence was the market value of the remainder of the Travis land and improvements, exclusive of the land and commercial buildings and other improvements condemned, immediately before the taking of the part condemned on October 28, 1983?"

"Answer in dollars and cents."

"ANSWER: $108,933.00"

"SPECIAL ISSUE NO. 3

"What do you find from a preponderance of the evidence was the market value of the remainder of the Travis land and improvements immediately after the taking of the land together with the commercial buildings and other improvements by the State for widening the State Highway, Spur 380, taking into consideration the uses to which the property condemned is to be subjected?"

"Answer in dollars and cents."

"ANSWER: $75,000.00"

which said verdict was received by the Court and filed, and the said jury was thereupon discharged; and the Court having considered the pleadings, evidence and the verdict of the jury, is of the opinion that judgment should be rendered as hereinbelow set forth; accordingly, it is hereby

ORDERED, ADJUDGED and DECREED that the Plaintiff, the State of Texas, do have and recover of and from the Defendants, Charles D. Travis, et ux and William V. Travis, et ux, fee title and possession of the tract of land situated in Beaumont, Jefferson County, Texas, described in Exhibit "A" attached hereto and made a part hereof for the purpose

of constructing, reconstructing, maintaining, widening, straightening and lengthening State Highway Spur 380, designate as a part of the State Highway System by the State Highway and Public Transportation Commission of the State of Texas.

Provided, however, there is excluded from said estate condemned and reserved to the Defendants, Charles D. Travis, et ux and William V. Travis, et ux all oil, gas and sulphur in, on and under said land without any right whatever remaining to said Defendants of ingress or egress to or from the surface of said land condemned for the purpose of exploring, developing, drilling or mining of such oil, gas or sulphur. And provided further that the remaining premises of Defendants Charles D. Travis, et ux and William V. Travis, et ux shall have access and ingress and egress to and from Spur 380 (for which the property described in Exhibit "A" is condemned) subject to the valid exercise of the police power of the State of Texas and the City of Beaumont, and such

right of access and ingress and egress is not condemned herein.

It is further ORDERED, ADJUDGED and DECREED that the Plaintiff, the State of Texas, do have and recover of and from the Defendants, Charles D. Travis, et ux and William V. Travis, et ux, title to all that commercial building no. 1 and commercial building no. 3 located partially on the remaining property of which the property described in Exhibit "A" was originally a portion, said building no. 1 being traversed by the first call of the metes and bounds description set for in Exhibit "A", which call enters the south side of said building no. 1 three feet east of the interior southwest corner of said building no. 1 and leaves said building no. 1 on the north side, fifty-one and five tenths feet west of the northeast corner thereof, and said building no. 3 being traversed by the first call of the metes and bounds description set forth in Exhibit "A", which call enters the south side on building no. 3 two and three tenths feet

east of the southwest corner of said building no. 3 and leaves said building no. 3 on the north side, eighteen feet west of the northeast corner thereof, with the result that the portion of said building no. 1 and building no. 3 lying east of said call would be in such condition that it could not be adequately reconstructed at such location; plus the temporary right to enter upon the property remaining, of which the above-described premises were originally a portion, for the sole purpose of removing all of said commercial building no. 1 and no. 3.

It further appearing to the Court that under the verdict of the jury the Defendants Charles D. Travis, et ux and William V. Travis, et ux are entitled to recover from the Plaintiff, the City of Beaumont, the sum of ONE HUNDRED FIVE THOUSAND DOLLARS ($105,000.00) as compensation for the condemnation described herein;

And it further appearing to the Court that Plaintiff, the City of Beaumont, has deposited into the registry of this Court the

sum of ONE HUNDRED SIXTY THOUSAND DOLLARS ($160,000.00) in accordance with the Special Commissioners' award; [and it further appearing to the Court that the Defendants Charles D. Travis, et ux and William V. Travis, et ux withdrew ONE HUNDRED FIFTY-NINE THOUSAND THREE HUNDRED SEVENTY-SEVEN DOLLARS AND SIXTY-ONE CENTS ($159,377.61) of this deposit and the remaining Defendants withdrew the remaining SIX HUNDRED TWENTY-TWO DOLLARS AND THIRTY-NINE CENTS ($622.39) of said deposit and that the deposit of said Plaintiff herein is more than the verdict of the jury in the amount of FIFTY-FIVE THOUSAND DOLLARS ($55,000.00),

It is, therefore, ORDERED, ADJUDGED and DECREED that the Plaintiff, the City of Beaumont, do have and recover of and from Defendants Charles D. Travis, et ux and William V. Travis, et ux the sum of FIFTY-FIVE THOUSAND DOLLARS ($55,000.00) together with interest thereof from the date of this judgment at the rate of nine percent (9%) per annum until the same is paid, which

said sum of FIFTY-FIVE THOUSAND DOLLARS ($55,000.00) may be paid and this judgment against said Defendants be fully discharged by deposit of said amount with the Clerk of this Court subject to the order of the City of Beaumont;

And it further appearing to the Court that the portion of the SIX HUNDRED TWENTY-TWO DOLLARS AND THIRTY-NINE CENTS ($622.39) withdrawn by each of the Defendants, the City of Beaumont, South Park Independent School District, the State of Texas, and the County of Jefferson, as claimants by virtue of taxes which have been accrued, equals the sum due that Defendant;

It is ORDERED, ADJUDGED and DECREED that Defendants, the City of Beaumont, South Park Independent School District, the State of Texas, and the County of Jefferson, as claimants by virtue of taxes which have accrued, do have and recover nothing further from the State of Texas and the City of Beaumont.

It is further ORDERED, ADJUDGED and DECREED that the remaining ONE HUNDRED FOUR THOUSAND THREE HUNDRED SEVENTY-SEVEN DOLLARS AND SIXTY-ONE CENTS ($104,377.61) of the amount heretofore deposited by the Plaintiff, the City of Beaumont, into the registry of this Court, in accordance with the Special Commissioners' award and withdrawn by the Defendants, Charles D. Travis, et ux and William V. Travis, et ux be retained by the said Defendants as their property;

It is further ORDERED, that all costs of Court in this behalf incurred be, and the same are hereby, taxes against Plaintiff, the City of Beaumont, and the Clerk of this Court is directed to tax same accordingly.

Signed this 19th day of July, 1985.

/s/Alfred S. Gerson

Judge Presiding

DESCRIPTION

Being 0.1437 acre of land, more or less being out of and a part of that certain tract of land in the David Brown League, Abstract No. 5, in the City of Beaumont, Jefferson County, Texas, said tract of land conveyed to Charles D. Travis by Deeds dated January 15, 1952 and June 2, 1960 and recorded in Volume 843, Page 189 and Volume 1222, Page 241 Deed Records, Jefferson County, Texas, said 0.1437 acre tract being more particularly described by metes and bounds as follows:

Commencing at the Southeast corner of said grantor's tract of land, said corner also being the Northeast corner of a 0.0293 acre tract belonging to Entex, Inc., which is recorded in Volume 1646, Page 286 of the Deed Records, Thence S 76° 30' 12.70" W along the South line of said grantor's tract and North line of said 0.0293 acre tract belonging to Entex, Inc., a distance of 67.98 feet to the POINT OF BEGINNING of the tract herein conveyed:

THENCE N. 41° 54' 28.44" W along the proposed East right of way line of Spur 380, a distance of 257.20 feet to a point for corner in the North line of said grantor's tract:

THENCE S 48° 05' 31.56" W along the said North line, a distance of 25.00 feet to a point for corner in the existing East right of way line of Spur 380:

THENCE S 41° 54' 28.44" E along the existing East right of way line of Spur 380, a distance of 243.68 feet to a point for corner in the South line of said grantor's tract:

THENCE N 76° 30' 12.70" E along the said South line, a distance of 28.42 feet to the POINT OF BEGINNING.

EXHIBIT "A"

AND IN ADDITION THERETO:

Title to all that Commercial Building No. 1 and Commercial Building No. 3 located partially on the remaining property of which the above described property was originally a portion, said Building No. 1 being traversed by the first call of the above metes and bounds description, which call enters the south side of said Building No. 1 three feet east of the interior southwest corner of said Building No. 1 and leaves said Building No. 1 on the north side, fifty-one and five tenths feet west of the northeast corner thereof, and said Building No. 3 being traversed by the first call of the above metes and bounds description, which call enters the south side on Building No. 3 two and three tenths feet east of the southwest corner of said Building No. 3 and leaves said Building No. 3 on the north side, eighteen feet west of the northeast corner thereof, with the result that the portion of said Building No. 1 and Building No. 3 lying east of said call would be in such condition that it could not be adequately reconstructed at such location; plus the temporary right to enter upon the property remaining, of which the above-described premises were originally a portion, for the sole purpose of removing all of said Commercial Building No. 1 and No. 3.

NO. 09-85-246-CV

CHARLES D. TRAVIS, ET UX AND WILLIAM V. TRAVIS, ET UX, Appellants	*	APPEAL FROM COUNTY COURT AT LAW OF
VS.	*	JEFFERSON COUNTY,
THE STATE OF TEXAS, ET AL, Appellees	*	TEXAS, NO. 1

O P I N I O N

Appeal from condemnation proceeding. Charles D. Travis and his wife, and William V. Travis and his wife, were the owners of certain real property and buildings. Hereafter, the are called "Owners". At trial, the State of Texas and the City of Beaumont recovered title and possession of a tract of land located in Beaumont, as well as the ownership, possession and title to certain buildings thereon. The condemnation involved a partial taking, rather than a total taking.

The property of the Owners or the condemnees was situated on Railroad Avenue where same intersects with Washington Boulevard in Beaumont, Texas. In approximate terms, twenty-five (25) feet on the street

side of the Owners' property was taken. All of Building #1 wherein the Owners conducted their family business, as well as all of Building #3, which was used for storage, was taken. However, only about 2.4 to 2.6 feet of the Owners' building designated as Building #2 was taken. At times material to this condemnation proceeding, Building #2 was utilized by Owners' lessee as a place of business. The date of taking the property by the State was October 28, 1983.

Point of Error Number One, urged and argued by the Owners, is that the "[e]ntry of judgment by the Court was error in that the State failed to prove jurisdiction." As a necessary prerequisite to the Court jurisdiction in an eminent domain or condemnation proceeding, the condemnor must prove that it had the right to condemn the land in the suit. Ready v. City of Marshall, 234 S.W.2d 194 (Tex. Civ. App.--Fort Worth 1950, no writ); Miers vs. Housing Authority of City of Dallas, 266 S.W.2d 842 (Tex. 1954); Mayberry vs. Pedernales Electric

Cooperative, Inc., 493 S.W.2d 268 (Tex. Civ. App.--Austin 1973, writ ref'd n.r.e.)

In Mayberry, supra, the court held, in substance, at page 268:

> "Failure of condemnor [sic] to present proof that its governing body adopted resolution or took other appropriate action finding that taking of property was for convenience and necessity of public deprived court of jurisdiction to entertain condemnation action by condemnor [sic]. Vernon's Ann. Civ. St. Art. 1528b."

According to Mayberry, supra, at page 270:

> "The record does not disclose that appellant admitted, or that the parties stipulated, that there existed a necessity for taking of appellant's property by Pedernales Electric, or that the condemnor [sic] had taken all steps required to effect a lawful taking. . . Appellant therefore has not waived her right to challenge jurisdiction of the court and has not consented to the taking. State v. Jackson, 388 S.W.2d 924 (Tex. Sup. 1965).
>
> "The rule we conclude is applicable to the facts of this case is stated by Rayburn and is supported by decisions of Texas courts. Rayburn states:
>
> > "'In those situations, where the condemnor [sic] as plaintiff, has not been able to obtain from the condemnee any admission or agreement of any kind whatever, that the condemnor [sic] has the right under the law to condemn, and

> that all necessary steps have been taken in the manner, and at the time required by law, then the condemnor [sic] must be prepared to introduce for the purpose of showing jurisdiction in the county court, or county court at law:
>
> * * * * * *
>
> "(2)Resolution of City County, orders or minutes of State Highway Commission--Commissioners Courts, Board of Directors." (Emphasis added) Texas Law of Condemnation, Madison Rayburn, Sec. 84." (Emphasis theirs)

Quoting further, at page 271:

> "But this rule does not relieve the condemnor [sic] of the burden to show that a determination of convenience and necessity to serve the public has been made by the governing body, the board of directors, or other authority having power to speak and act for the condemnor [sic]. [Citations omitted]"

However, the judgment in our case recites:

> ". . .[A]nd it further appearing to the Court that the Defendants Charles D. Travis, et ux and William V. Travis, et ux withdrew ONE HUNDRED FIFTY-NINE THOUSAND THREE HUNDRED SEVENTY-SEVEN DOLLARS AND SIXTY-ONE CENTS ($159,377.61) of this deposit. . ."

Additionally, the actual original of the Civil Fee Book in this case shows:

> "11/1/83 Recd from R. L. Barnes Ck # 2839 made payable [sic] to Charles D.

Travis & Wife Anne Lois Travis and
William V. Travis & Wife Delores T.
Travis Fee Owners as per Order of the
Court

$159,377.61
NOV JLW 1983
Floyd A. Landrey"

For the sake of judicial economy and our deciding this jurisdictional point as a practical matter, we have actually viewed the original Civil Fee Book and all its entities in this case in the custody of Honorable R. L. Barnes, County Clerk of Jefferson County. In his office was also produced the check in the sum of $159,377.61. It has been cashed and negotiated with the endorsements of Charles D. Travis, Anne Lois Travis, William V. Travis and Delores T. Travis. Hence, we find no real or practical merit in Appellants' Point of Error Number One. It is overruled.

Next, the Owners complain and argue that the court below erred in excluding evidence of lost rental income which was occasioned by the government's action in relocating the Owners' tenant long prior to the date of taking. The Owners vehemently contend and

argue that this lost rental income is to be properly considered in awarding just compensation and damages to the landowners.

We must recall that this is a partial taking of the Owners' land and a partial taking of a certain building. The record before us shows that this element of lost rental income, which resulted from the government relocating a certain tenant of Owners, prematurely, at least raised the issue of how much rental loss the Owners sustained. From the Bill of Exception, it is shown that 29 months, at $1,000.00 per month, was raised by the excluded evidence together with interest amounting to $33,450.00. The partial taking is shown as follows:

> ". . .Building number two designated here shows it as a motorcycle shop which it had been prior to 19, November 1980, but is a 60 foot building and it is shown in blue. It's going to lose two and a half feet of the front wall of the building. It's going to lose 2.4 feet on the north side and 2.6 on the south side, all of its parking and the front wall and awnings. Building number three is going to be torn down. . ."

Part of this Building No. 2 was being used and leased by Lessee in the business of conduction a motorcycle shop. The Owners argue that prior to October 28, 1983, which was the date of taking, the State contacted the Lessee of Building No. 2 and relocated Lessee. In about 1980, Dwayne Markum (Markham) rented Building No. 2 from the Owners. His business was that of a licensed dealer in Harley-Davidson motorcycles. He was contacted directly by a representative of the State, concerning the relocation of his business. Markham followed the State relocation assistance program. The State paid most of his relocation expenses and the people representing the State assisted him in moving.

Markham understood that the space to be taken would be his parking space that he had for his customers, in front, and also it would eliminate Markham's showroom for his Harley-Davidson motorcycles. In fact, the State's representative told him that his glass front showroom would have to be bricked

in. Markahm had the firm opinion that he could not operate his business without a glass front showroom. A representative of the State indicated that the would lose this glass front showroom. None of the Travises, the Owners, indicated that they would brick in the front part of Markham's showroom.

Markham testified, on cross-examination, to questions asked by the condemnor's trial attorney, that a representative from the State Highway Department visited with him and told him what options were, if he moved at that time; that is, when he was first visited or soon afterwards. Then he could receive assistance. Secondly, he was told, also, that if he waited until the property was actually condemned, he could not qualify. Markham testified that he did not initiate the contact with the representative of the State not did he, initially, request the State to relocate him. Markham denied that. In fact, he said:

> ". . . [T]he first I heard about it was when the representative came to the shop."

A State witness, one Lynwood Walters, a relocation agent, verified, in substance, the testimony of Markham and Walters indicated that he did have discussions with the Lessee, Markham, about relocation considerably prior to the date of taking.

By means of a State's Motion in Limine, prior to the jury selection, the Court, by its ruling on the said Motion, excluded the Owners' evidence relating to the lost rental income. A proper Bill of Exception was developed and tendered on the lost rental income and was tendered to the Court and overruled by the Court. We determine that the jury should have been permitted to hear this evidence.

As to Building #2, it is undoubted that only a part of the real estate and a part of the building was taken. Unquestionably, the State and its representatives, considerably prior to the date of taking, invaded the Owners' property and had a conversation with Owners' tenant. This action amounted to a physical invasion of the Owners' property.

Perhaps the leading case on the lost rental income is the City of LaGrange v. Pieratt, 142 Tex. 23, 175 S.W.2d 243 (1943). The Supreme Court discussed the recovery of loss of profits in a partial taking situation. We quote from the opinion as follows, at page 246:

> "For it to be considered that damages are to property, it is not necessary that such damages are to be measured by the extent of the injury to the physical property itself. 'A right of recovery is established by proof of injury to some right of property, and the damages are measured by the extent of the injury to that right. Thus a business is property, and the reasonable damages for interference with the access to business property may be measured. . .by the loss of profits.' 16 Tex. Jur. pp. 976-978, and authorities there cited; Hart Bros. v. Dallas County, Tex. Com. App., 279 S.W. 1111.
>
> "In a proceeding for the condemnation of a part of a tract of land for street or road purposes, it is presumed that the amount of damages allowed covers all lawful elements of damages, whether direct or consequential, that could reasonably have been foreseen and determined at the time of condemnation; and where a part of a tract of land is condemned for street or road purposes, the owner cannot recover in a subsequent proceeding for consequential damages to the remainder of the land which he ought reasonably have foreseen and presented

in the condemnation proceeding. State vs. Brewer, et ux, Tex. Sup. 169 S.W.2d 469. In this connection, we think that where a part of a tract of land is condemned for street or road purposes, and the owner claims consequential damages to the land left, on account of the loss of profits arising from an established business being conducted thereof, while the road or street improvements are in progress, such claim may and should be presented at the condemnation proceeding, if it is of such a nature that it could reasonably have been foreseen and determined at the time. State vs. Brewer, supra, 16 Tex. Jur., p. 954, and authorities there cited.

"It is the law that where a breach of contract or a tort results in damages to an established business, in the form or loss of profits, which would have been derived therefrom absent such a breach of contract or tort, the owner of such business may recover damages from the party causing such loss, measured by the amount of such loss of profits. 28 Tex. Jur. p. 215, sec. 114, and authorities there cited. We have already shown that the same rule applies in condemnation proceedings. In such proceedings, an established business is property, and damages thereto in the form of loss of profits should be taken into consideration in such proceedings.

"Profits which would have been earned by an established business, absent any interference therewith, are in their very nature more or less conjectural, uncertain, and speculative, but this does not deprive the party injured by such interference of his right to recover. In other words, the difficulties which may lie in the way of making proof will not defeat a recovery.

> It is not necessary that damages in the form of loss of profits should be susceptible of calculation. All that is required is that they be ascertained with a reasonable degree of certainty. 13 Tex. Jur. p. 207, sec. 108, and authorities there cited.
>
> "Measured by the above rules, we think that Pieratt has a perfect right to present his expected loss of profits, as an element of consequential damages to his property, in the condemnation proceedings above mentioned. Since he had such right, we think it follows, as a matter of course, that it was his duty so to do. . .
>
> ". . .As already stated, the amount of damages such as these is always more or less uncertain, conjectural, and speculative; but that does not prevent their presentation and adjudication in a condemnation proceeding. As to such damages, the law does not require that the amount of damages be certainly or definitely proved."

However, in our case, the amount of the rentals was definitely fixed. We find that the amount of lost rental income was not uncertain, conjectural and speculative. In any event, we think this evidence should have gone before the jury. It was their prerogative, duty and right to weigh this evidence concerning the damage issue in awarding just compensation.

The City of LaGrange, supra, case also squarely holds that our laws regarding eminent domain make provision for two distinct condemnation situations. The first is the taking of the whole tract of land and the second is the taking of only a part. In LaGrange, supra, case, the Supreme Court announced that it was dealing with only the taking of a part of a tract. The court held that the damages to be recovered were all lawful damages, both direct and consequential that accrued to Pieratt on account of the condemnation of a part of his land.

We conclude that the record in our case is meaningfully different and clearly distinguishable from the case of State v. Vaughan, 319 S.W.2d 349 (Tex. Civ. App.--Austin 1958, no writ history). In State v. Vaughan, supra, the State notified, merely by written letter, the owners of their intent to take the property in a condemnation proceeding. The case further held that the mere fact that the tenants in an apartment house informally learned of the contemplated

condemnation and, because of such informal information, elected to vacate the property, did not afford the owners the right to recover damages from the State. Also, Vaughan, supra, was a total taking as distinguished from a partial taking case; the court writing at page 354:

> ". . .The mere fact that tenants learn of contemplated condemnation and because of such information elect to vacate the property does not afford the owner the right to recover damages from the State because there has been neither a taking or any character of a physical invasion of the property. Indeed the condemnation may be completely abandoned and the property never taken. Art. 1, Sec. 17, Constitution of Texas, provides that the condemning authority must pay for taking, damaging or destroying property. Here there is a taking of the entire interest of the defendants in the property and there is no question of damage to a part not taken. The loss of tenants and the resulting loss of rentals was, in any event, incidental or consequential to the taking of the entire property by the State and for which reason the State is not liable for such consequential damage. City of Houston v. Wall, Tex. Civ. App., 207 S.W.2d 664, 670, Er. ref., n.r.e. Moreover prior to March 25, 1958, there is no showing of any physical invasion or appropriation of the property and therefore no prior taking shown. Webb v. Dameron, Tex. Civ. App., 219 S.W.2d 581, Er. ref., n.r.e."

The condemnors and Appellees cite Texas "Relocation and Assistance Program", TEX. REV. CIV. STAT. ANN. art 3266b, repealed by Acts 1983, 68th Leg., the repeal being effective January 1, 1984, by enacting TEX. PROP. CODE ANN., sec. 21.046 (Vernon 1984). Also cited is the Federal Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, 42 U.S.C.A. sec. 4601, et seq. (West 1983). Appellees take the position that Mr. Markham, who had the motorcycle business and had a franchise from Harley-Davidson Motorcycle Factory, "was a potential displacee".

When first contacted, Mr. Markham was still a lessee of the Owners and was in the process of renegotiating a new lease. Appellees cited Article 3266b, V.T.C.S. [Acts 1973, 63rd Leg. p. 1625, ch. 586, Sections 1 and 2], (repealed by Acts 1983, 68th Legislature, p. 3729, ch. 576, Sec. 6, effective January 1, 1984 enacting V.T.C.A. Property Code Section 21.046), which reads as follows:

> "Section 1. When in the acquisition of real property for a program or project undertaken by any department, agency, or instrumentality of this State or of a political subdivision of this State it becomes necessary that any individual, family, property of a business concern, farm or ranch operation, or nonprofit organization be displaced they may be paid their moving expenses and relocation payments, provided financial assistance to acquire replacement housing, or allowed rental supplements and compensation for expenses incidental to the transfer of property to the State, all of which payments or expenditures are hereby declared to be an expense and cost of such property acquisition. Each department, agent, or instrumentality of this State or of a political subdivision of this State shall formulate the rules and regulations necessary to carry out the provisions of this section and shall not authorize payments or expenditures in excess of those authorized by or under the Federal Uniform Relocation Assistance and Real Property Acquisition Policies Program."

We construe both statutes, state and federal, to the effect that they do not diminish the Owners' right to just compensation and these statutes do not make inadmissible the testimony and evidence proffered in the instate case, which was set out in the Bill of Exception.

Having found reversible error, in the record, we hereby reverse the judgment of the court and remand the cause for a new trial.

REVERSED AND REMANDED.

The Court has determined that the foregoing opinion does not meet the criteria for publication set out in TEX. R. CIV. P. 452, sec. (b); consequently, it is ORDERED that the Clerk shall make distribution of the opinion only to the persons specified in TEX. R. CIV. P. 452, sec. (f).

PER CURIAM

Opinion delivered
June 5, 1986

IN THE SUPREME COURT OF TEXAS

NO. C-5588

THE STATE OF TEXAS, ET AL, Petitioners,	§	
v.	§	FROM JEFFERSON COUNTY NINTH DISTRICT
CHARLES D. TRAVIS, ET AL, Respondents.	§	

PER CURIAM

The question before us is whether, in a condemnation suit, evidence of lost profits is admissible as a separate item of damages. The trial court held that the evidence was not admissible. The court of appeals, in an unpublished opinion, reversed the judgment of the trial court and remanded to that court in order that the evidence on lost profits could be presented to a jury. We reverse the judgment of the court of appeals.

The State of Texas condemned certain property in Beaumont to widen a state highway. One partially condemned building owned by the Travises had been leased out by them to a Mr. Markham for use as a motorcycle

sales shop. Representatives of the state contacted Markham and informed hims of the state's intent to condemn. Markham moved out and found other commercial space.

At trial, the Travises attempted to proffer testimony that they lost rental profits of $1,000.00 per month for 29 months. The trial court disallowed the testimony. The court of appeals held that such testimony is admissible.

In City of Dallas vs. Prioli, 150 Tex. 423, 242 S.W.2d 176 (1951), this court noted that evidence of injury to a business is admissible in a condemnation suit to show that the market value of the land was affected by the condemnation. The Court stated, however, that evidence of injury resulting from condemnation is not admissible as a separate item of damage.

In the instant case, the Travises sought lost business profits as a separate item of damages over and above the fair market value of the land taken and the damages occasioned to the remainder by reason of the taking.

Because of the opinion of the court of appeals is contrary to the rule announced in Prioli, pursuant to Tex. R. App. P. 133(b), a majority of this court grants the writ of error, and without hearing oral argument, reverses the judgment of the court of appeals and affirms the judgment of the trial court.

OPINION DELIVERED: January 14, 1987.

ORDER OF THE COURT

February 18, 1988

NO. C-5588	)	
	)	
THE STATE OF TEXAS ET AL.	)	
	)	From Jefferson County
vs.	)	Ninth District
	)	
CHARLES D. TRAVIS ET AL.	)	

Respondent's motion for rehearing filed herein on January 29, 1987 in the above numbered and entitled cause having been duly considered, it is ordered that said motion for rehearing be, and hereby is, overruled.

NO. C-5588	)	
	)	
THE STATE OF TEXAS	)	
ET AL.	)	
Petitioners	)	
	)	From Jefferson County
vs.	)	Ninth District
	)	
CHARLES D. TRAVIS	)	
ET AL.	)	
Respondents	)	

This case was reviewed on application for writ of error from the Court of Appeal for the Ninth District. The original transcript and the transcript showing the proceedings in the court of appeals were considered.

It is the opinion of the court there is error in the judgment of the court of appeals which reversed the judgment of the trial court and remanded the cause in order that the evidence on lost profits could be presented to the jury. The trial court held that the evidence was not admissible.

The application for writ of error is granted. Under the provisions of Rule 133(b) Tex. R. App. P., without hearing oral argument, and in accordance with the opinion

of this court,

it is ordered that:

1) As evidence of lost profits is not admissible as a separate item of damages in a condemnation case, the judgment of the court of appeals is reversed.

2) The judgment of the trial court is affirmed.

3) Charles D. Travis et al. and surety, Lawyers Surety Corporation, shall pay the costs of this court and the court of appeals.

4) The State of Texas et al. shall recover its costs in those courts from Charles D. Travis et al. and said surety.

A copy of this judgment shall be certified to the County Court of Jefferson County, Texas for observance.

(Per Curiam Opinion)

SUPREME COURT OF TEXAS
P. O. Box 12248
Supreme Court Building
Austin, Texas 78711
Mary M. Wakefield, Clerk

February 18, 1987

Mr. Tyrone E. Cooper
Assistant City Attorney
City of Beaumont
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Beaumont, Texas 77704

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Mr. Floyd A. Landrey
Moore, Landrey, Garth & Jones
285 Liberty
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Beaumont, Texas 77701

RE: Case No. C-5588

STYLED: THE STATE OF TEXAS ET AL.
v. CHARLES D. TRAVIS ET AL.

Dear Counsel:

Today, the Supreme Court of Texas overruled the Motion for Rehearing in the above referenced cause.

Respectfully yours,

Mark M. Wakefield, Clerk

By /s/Blanca E. Morin
Deputy

cc: Mr. John M. Schiltz
Office of the Attorney General
P. O. Box 12548
Capitol Station
Austin, Texas 78711

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SUPPLEMENTAL APPENDIX

42 UNITED STATES CODE SECTION 4601.

As used in this chapter -

(1) The term "Federal agency" means any department, agency or instrumentality in the executive branch of the Government (except the National Capital Housing Authority), any wholly owned Government corporation (except the District of Columbia Redevelopment Land Agency), and the Architect of the Capitol, the Federal Reserve banks and branches thereof.

(2) The term "State" means any of the several States of the United States, the District of Columbia, the Commonwealth of Puerto Rico, any territory or possession of the United States, the Trust Territory of the Pacific Islands, and any political subdivision thereof.

(3) The term "State agency" means the National Capital Housing Authority, the District of Columbia Redevelopment Land Agency, and department, agency or instrumentality of a State or of a political subdivision of a State, or any department, agency or instrumentality of two or more States or of two or more political subdivisions of a State or States.

(4) The term "Federal financial assistance" means a grant, loan or contribution provided by the United States, except any Federal guarantee or instrument any any annual payment or capital loan to the District of Columbia.

(5) The term "person" means any individual, partnership, corporation or association.

(6) The term "displaced person" means any persons who, on or after January 2, 1971,

moves from real property, or moves his personal property from real property, as a result of the acquisition of such real property, in whole or in part, or as the result of the written order of the acquiring agency to vacate real property, for a program or project undertaken by a Federal agency, or with Federal financial assistance; and solely for the purposes of sections 4622(a) and (b) and 4625 of this title, as a result of the acquisition of or as the result of the written order of the acquiring agency to vacate other real property, on which such person conducts a business or farm operation, for such program or project.

(7) The term "business" means any lawful activity, excepting a farm operation, conducted primarily -

(A) for the purchase, sale, lease and rental of personal and real property, and for the manufacture, procession or marketing of products, commodities, or any other personal property;

(B) for the sale of services to the public;

(C) by a nonprofit organization; or

(D) solely for the purposes of section 4622(a) of this title, for assisting in purchase, sale, resale, manufacture, processing or marketing of products, commodities, personal property, or services by the erection and maintenance of an outdoor advertising display or displays, whether or not such display or displays are located on the premises on which any of the above activities are conducted.

(8) The term "farm operation" means any activity conducted solely or primarily for the production of one or more agricultural products or commodities, including timber,

for sale or home use, and customarily producing such products or commodities in sufficient quantity to be capable of contributing materially to the operator's support.

(9) The term "mortgage" means such classes of liens as are commonly given to secure advances on, or the unpaid purchase price of, real property, under the laws of the State in which the real property is located, together with the credit instruments, if any secured thereby.

42 UNITED STATES CODE SECTION 4627.

State required to furnish real property incident to Federal assistance (local cooperation)

Whenever real property is acquired by a State agency and furnished as a required contribution incident to a Federal Program or project, the Federal Agency having authority over the program or project may not accept such properly unless such State agency has made all payments and provided all assistance and assurances, as are required of a State agency by sections 4630 and 4655 of this title. Such State agency shall pay the cost of such requirements in the same manners and to the same extent as the real property acquired for such project, except that in the case of any real property acquisition or displacement occurring prior to July 1, 1972, such Federal agency shall pay 100 per centum of the first $25,000 of the cost of providing such payments and assistance.

V.T.C.A. PROPERTY CODE, SECTION 21.046.

"Section 1. When in the acquisition of real property for a program or project undertaken by any department, agency, or instrumentality of this State or of a political subdivision of this State it becomes necessary that any individual, family, property of a business concern, farm

or ranch operation, or nonprofit organization be displaced they may be paid their moving expenses and relocation payments, provided financial assistance to acquire replacement housing, or allowed rental supplements and compensation for expenses incidental to the transfer of property to the State, all of which payments or expenditures are hereby declared to be an expense and cost of such property acquisition. Each department, agent, or instrumentality of this State or of a political subdivision of this State shall formulate the rules and regulations necessary to carry out the provisions of this section and shall not authorize payments or expenditures in excess of those authorized by or under the Federal Uniform Relocation Assistance and Real Property Acquisition Policies Program."

TEXAS DEPARTMENT OF HIGHWAYS AND PUBLIC TRANSPORTATION RIGHT OF WAY MANUAL.

500. Relocation Policies and Procedures

500.01 General

This chapter prescribed the policies and procedures for relocating and reestablishing individuals, families, businesses, farms and nonprofit organizations displaced in the acquisition of right of way for the State Highway System.

500.02 Purpose

The rules, policies and procedures outlined in this chapter are intended to establish a means of providing relocation services and of making moving cost payments and replacement housing cost payments so as to insure to the maximum extent possible the prompt and equitable relocation and reestablishment of those displaced by the Highway System.

540. Notices and Contacts with Displacees

540.01 Notice of Relocation Eligibility

Eligibility for relocation assistance shall begin on date of initiation of negotiations for the occupied real property. When this occurs the occupants of the real property will be promptly notified in writing of their eligibility for applicable relocation benefits. This notice can be:

A. Given to the displacees by personal contact or sent by certified mail, return receipt requested.

B. Issued independently or with other notices, but in no case later than 30 days after the initiation of negotiations for the real property or less than 90 days prior to the time the displacee will be required to vacate the real property.

540.02 General Information Notice

A. As soon as feasible, a person scheduled to be displaced should be notified about the possibility of his or her displacement or furnished:

1. A general written description of the Department relocation program which does at least the following:

a. Informs the person that he or she may be displaced for the project and general describes the relocation payment(s) for which the person may be eligible, the basic conditions of eligibility, and the procedures for obtaining the payment(s).

b. Indicates that any person displaced will be given reasonable relocation advisory services including housing

referrals, help in filing payment claim(s), and other necessary assistance to help the person successfully relocate.

c. Informs any person to be displaced from a residential dwelling that he or she cannot be required to move permanently unless at least one comparable replacement dwelling has been made available to the displaced person. No person will be required to move without at least 90 days advance notice. (Section 540.05.)

d. Described the person's right to appeal the Agency's determination as to eligibility for, or the amount of, any relocation payment for which the person is eligible. (Section 570.01A.)

e. Informs the displaced person that he or she must provide the Department reasonable advance notice of the approximate date of the date of his or her move or disposition of the displaced personal property and provide the Department a list of items to be moved. (Section 545.08A.)

f. Inform the displaced person that he or she must permit the Department to make reasonable and timely inspections of the personal property at both the displacement and replacement sites and to monitor the move. (Section 545.08A.)

2. A copy of the brochure.

B. This notice may be issued independently or with other notices, but in no case will it be issued later than 30 days

after the initiation of negotiations for the real property or less than 90 days prior to the time the displacee will be required to vacate the real property.

C. When this notice is sent by certified mail it should be followed by personal contact within 30 days of the written notice to furnish any additional explanations necessary.

UNITED STATES CONSTITUTION, AMENDMENT V.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; not shall private property be taken for public use, without just compensation.

TEXAS CONSTITUTION, ARTICLE 1, SECTION 17.

Taking, damaging or destroying property for public use; special privileges and immunities; control of privileges and franchises

Sec. 17. No person's property shall be taken, damaged or destroyed for or applied to public use without adequate compensation being made, unless by the consent of such person; and, when taken, except for the use of the State, such compensation shall be first made, or secured by a deposit of money; and no irrevocable or uncontrollable grant of special privileges or immunities, shall be made; but all privileges and franchises

granted by the Legislature, or created under its authority shall be subject to the control thereof.

UNITED STATES CONSTITUTION, AMENDMENT XIV, SECTION 1.

Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, with due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

(2)

Supreme Court, U.S.
FILED
JUN 10 1987
JOSEPH F. SPANIOL, JR.
CLERK

NO. 86-1804

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1986

CHARLES D. TRAVIS, *et ux.* and
WILLIAM V. TRAVIS, *et ux.*,
Petitioners,

V.

THE STATE OF TEXAS, *et al.*
Respondents.

On Petition for a Writ of Certiorari
to the Supreme Court of Texas

MEMORANDUM IN OPPOSITION

Of Counsel:

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IN THE
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CHARLES D. TRAVIS, *et ux.* and
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Petitioners,

V.

THE STATE OF TEXAS, *et al.*
Respondents.

On Petition for a Writ of Certiorari
to the Supreme Court of Texas

MEMORANDUM IN OPPOSITION

Certiorari should be denied:

I. Because the Petitioners did not press a constitutional issue in the Texas Courts and the Texas Courts did not pass upon a Constitutional issue.

II. Because it is the law in Texas, and generally, that income lost as the result of a condemnation is not recoverable as a separate and additional element of damages.

This case in the Texas state courts was a condemnation for highway purposes prosecuted by

the City of Beaumont, Texas for the State of Texas, as is the custom in Texas where a proposed state highway will traverse a city. In three Texas courts: the trial court, the Court of Appeals and the Supreme Court of Texas, Petitioners contended that they were entitled to recover rentals lost by the relocation of their tenant, *in addition* to the fair market value of the land condemned and damage to the remainder land. (Resp. App. A, pp. 4, 5, 7; Resp. App. B, pp. 7, 8, 11; Resp. App. C, pp. 2, 3; Resp. App. D, pp. 9-11; Resp. App. E, p. 4).

At no point in the case's journey through the courts of Texas did Petitioners specifically contend that the denial of an additional award for lost rentals constituted a denial of rights guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution (Resp. Apps. A-E). That contention *not* having been made, none of the three Texas courts that dealt with the case addressed the subject. (Pets. App. A, pp 20-55). Petitioners first *mention* (as contrasted with "contention") of Fifth and/or Fourteenth Amendment rights is found in their Motion, as Respondents in the Texas Supreme Court, seeking a stay of Mandate. Their first contention is found in their Petition for Certiorari in this Court when (Pet. p. 12) they assert that the exclusion from the jury of evidence of lost rental income constituted a taking without just compensation under Amendments V and XIV of the United States Constitution.

It is clear beyond doubt that the proposed testimony regarding lost rentals was proposed as a separate and additional element of damages. (Resp. App. A, pp. 1-9; Resp. App. C, pp. 1-4). That was the case before the Texas courts and it is perforce the case before this Court.

In the Texas Court of Appeals (Resp. App. B, p. 12) and in the Texas Supreme Court (Resp. App. D, p. 11), Petitioners' briefs did have the language:

> "Without the presentation of evidence of Owners' lost rent, the judgment resulted in an unreasonable and unjust award, and in effect, constituted the taking of Appellants' property without adequate compensation."[1]

Looking at that language in the light of the entire record, including especially the case footnoted with the quoted language, it is apparent that Petitioners were contending that they were deprived of adequate compensation when they did not get an award that included separate and additional compensation for lost rentals; that is, that their *rentals* were taken without adequate compensation therefor. In view of the record, the verbiage quoted cannot be contorted into the *pressing* of a Fifth or Fourteenth Amendment claim, as the cases require. Particularly, the verbiage cannot be so contorted when it is apparent that none of the Texas courts understood Petitioner to be contending for anything but additional, separate damages. That claim was *all* that the trial court had before it, and therefore what the Texas Court of Appeals and Supreme Court had before *them*. It is clear that the Texas Court of Appeals reversed the trial court for not permitting evidence of lost rents as a

---

[1]Art. 1 §17 of the Texas Constitution, the counterpart of the Fifth and Fourteenth Amendments to the United States Constitution requires *adequate* compensation.

separate and additional element of damages (Pet. App. A, pp. 36, 39, 42, 46), and equally clear that the Supreme Court of Texas reversed the Court of Appeals in that same regard. (Pet. App. A, p. 49).

I.

This petition for certiorari is made pursuant to 28 U.S.C. §1257 (3). The entire section provides:

> Final judgments or decrees rendered by the highest court of State in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> (1) By appeal, where is drawn in question the validity of a treaty or statute of the United States and the decision against its validity.
>
> (2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity.
>
> (3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or

> authority exercised under, the United States. June 25, 1948, c. 646, 62 Stat. 929.

This petition then seeks a writ of certiorari where a ". . . right, privilege or immunity is specially set up or claimed under the Constitution . . . of the United States."

A federal claim - e.g., taking of property in violation of the Fourteenth Amendment - cannot be considered by the Supreme Court unless the claim was raised in the state court or considered and decided by the state court. *Illinois v. Gates*, 462 U.S. 213, 218 note, 103 S.Ct. 2317, 2321, 76 L. Ed.2d 527 (1983), in which the Court quoted with approval *McGoldrick v. Compagnie Generale Transatlantique*, 309 U.S. 430, 434-435, 60 S.Ct. 670, 673, 84 L.Ed. 849 (1940):

> "But it is also the settled practice of this Court, in the exercise of its appellate jurisdiction, that it is only in exceptional cases, and then only in cases coming from the federal courts, that it considers questions urged by a petitioner or appellant not pressed or passed upon in the courts below..."[2]

---

[2]See *Exxon v. Eagerton*, 462 U.S. 176 at 181, 103 S.Ct. 2296, 76 L.Ed. 2d 497 (1983) in which this Court declined to assume jurisdiction of an issue *addressed* by a party in the State Supreme Court but not decided by it, particularly in the light of *Gray-Taylor, Inc., v. Tennessee*, 587 S.W.2d 668 (Tex.Sup.Ct. 1979) wherein it was held that a point raised for the first time on appeal will not be considered by an appellate court.

II.

It is settled law in Texas that in a partial-taking condemnation case the landowner may show loss of profits, not as a separate item of damages, but as affecting the market value of the remaining land and improvements for the uses to which they were adapted and were being put.[3] *City of Dallas v. Priolo*, 242 S.W.2d 176 (1951). In this case, Petitioners, without exception until they moved the Texas Supreme Court for re-hearing, sought the right to introduce evidence of lost profits only as a distinct, separate and additional element of damages.[4] In their motion for rehearing they shifted their ground, but even then they argued for additional damages on account of lost profits. (Resp. App. E, p. 5).

For the foregoing reasons the petition should be denied.

---

[3]Texas follows the general rule in this regard which is the same as the federal rule. See *Bothwell v. United States*, 254 U.S. 231, 233, 41 S.Ct. 74, 65 L.Ed. 238 (1920); *Joslin Mfg. Co. v. City of Providence*, 262 U.S. 668, 675, 43 S.Ct. 684, 67 L.Ed. 1167 (1923); *United States v. Powelson*, 319 U.S. 266, 281-283, 63 S.Ct. 1047, 87 L.Ed. 1390 (1943); *Stipe v. United States*, 337 F.2d 818, 821 (10th Circ. 1964)

[4]In their motion for re-hearing to the Texas Supreme Court Petitioners for the first time urged that they be allowed to present the evidence of lost rentals as bearing upon the value of the land condemned and damage to the remainder. That was not the case on the record before the Court.

Respectfully submitted,

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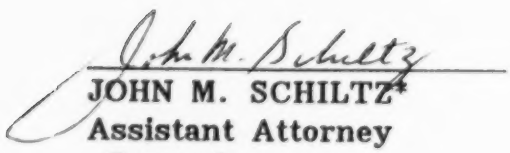

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June 10, 1987

APPENDIX A-1

46969

STATE OF TEXAS, ET AL	IN THE COUNTY COURT AT LAW
VS.	AT LAW OF
CHARLES D. TRAVIS, COUNTY, TEXAS	JEFFERSON ET UX

STATEMENT OF FACTS

VOLUME ONE OF THREE VOLUMES

APPEARANCES:

FOR THE PLAINTIFF:

Hon. Tyrone Cooper
Attorney at Law
801 Main Street
Beaumont, Texas 77701

FOR THE DEFENDANTS:

Hon. Floyd Landrey
Attorney at Law
285 Liberty, Suite 1900
Beaumont, Texas 77701

BE IT REMEMBERED that the above cause came on for trial on July 1, 1985, before the Honorable Alfred S. Gerson, Judge presiding in the County Court at Law No. One of Jefferson County, Texas, and the following proceedings were had:

(REPORTER'S NOTE: The following proceedings were had in chambers.)

MR. COOPER: Your Honor, this Motion was filed on behalf of the State of Texas and the City of Beaumont, who are Plaintiffs in this case, and the thrust of the Motion is that we request Your Honor to instruct Defendants and any witnesses on their behalf to refrain from introduction of evidence or alluding to any loss of income or rents by reason of loss or reduction of rental by reason of the impending condemnation.

What I think has happened is that the State announced the project and there was a tenant in the premises at the time and that tenant left the premises by his own election.

There is sufficient case law in my Brief, *State vs. Vaughn, Naumann v. Urban Renewal Agency* and *Parrish vs. State* supporting our position we have taken, which is the mere fact that because a letter was sent by the State indicating their intention to at some point in time condemn the property, is not sufficient for the property owners to make a claim for loss of rent where no taking or eviction of the premises had taken place, only a letter of intention and it is our position that the landowners are not entitled to loss of rent where there is not prior taking and we would request the Court to instruct the Defendants to refrain from introducing any evidence, oral or written, which relates to the loss of rent.

THE COURT: What say you?

MR. LANDREY: Your Honor, if I sound repetitious in this thing, I am doing it in that I have actually never tried or presented a condemnation case to this Court before so if you will bear with me, I would like to cover some things that might seem basic as they refer to his point against mine. Number One, he is absolutely right,

one hundred per cent right on the law that has always been the law and he cited cases, all of which I have read. In this case since it is not a whole taking of the property by the State, meaning the entire land and improvements, where there is no remainder, the law is clear that you cannot recover consequential damages of loss of rent as a result of the State having sent a letter to the owner telling him we are taking your property in the future. Therefore, his three cases all are whole takings and they clearly announce the rule that there can be no consequential loss of rent because there was never an invasion of Plaintiff's rights. That is not the case here. In our situation I expect to prove, if the Court denies his Motion, that we come under a partial taking, that they are taking approximately one and a half feet of the land involved, leaving a remaining building and land that they claim is still utilizable and, in fact, left the majority of its value. It being a partial taking, we come under the Supreme Court case which decided and settled the law in 1943 that I would like to present. It's the *City of La Grange* and I will just touch the highlights. It's a partial taking and the Plaintiff said they had damaged a property right that he had in his remainder because they blocked him off in the process and they invaded his property rights. He said they had damaged his ingress and egress. The Supreme Court, in answering said loss regarding eminent domain, makes a distinction in the taking of a whole tract of land and the taking of part. If it was a whole taking, he is not entitled to damages. But since this is a partial taking, the right to recover is established by proof of some right of property and damages measured by the extent of injuries. A business is property for which recovery can be had in eminent domain and can be measured by loss of profits. Now, where a part of a tract is condemned for said purposes and the owner claims damages to

the land left, on account of loss of profits arising from established business, such claim should be presented at the condemnation proceeding if it is of such a nature that it could have been foreseen. Where breach of contract or tort results, that is the key, to an established business in the form of loss of profits which would have been derived therefrom absent such breach, the owner may recover damages measured by the amount of profits and the same rule applies in condemnation proceedings. In this case, and I think that I can prove, they went in there three years ago and contacted a tenant of my client's in person, not by letter. They said, *We will pay you money to vacate and cancel your lease*, and the tenant said, *I'll take your money and run*, and he's gone. He's gone. And three years later in 1983 they have a taking and for the first time acquire the first one and one-half feet of what they paid the tenant to leave the entire tract. The interference was a tort. The State did it. They interferred with a contract on a remainder that they never intended to buy, and, therefore, under the Supreme Court case which says he must recover if he can prove it or is forever barred. I am saying that rent is a loss of profits. And what distinguishes my case from the ones Tyrone has is that his are whole takings and there cannot be consequential damages in a whole taking. I know that and he's right about that. But in a partial taking you must and can show any damage that is consequential or actual in showing your damage to the remainder, the way the owner is left. And I think it is absolutely admissible evidence to show that as an element of damage the evidence of tortious interference with a contract where the State did not take all of the property. If the status of our case was that it was a whole taking, I would agree. But this is a partial and he doesn't have one case on a partial taking. It would stand to reason that the State cannot go in and pay

a tenant with a contract to vacate. You simply cannot pay a man to violate his contract, but they did it. It was more than a letter. I think I can prove they paid the man to move. What I am getting down to is this---if a man, prior to the date of taking, being when the State actually acquires its right, and on a whole taking the State can always back out, likewise even on a partial taking they can back out. The owner has acquired nothing until they put up money and on whole taking the State would have the right to back out because you could never prove consequential damages as a result of a tenant vacating, but where they are leaving a remainder I do not think you can go in there and tell the tenant we will take the remainder and we will pay you to go now. We even put in another tenant and they paid him to move. So I think I should be able to show that for the pure reason that I think I am entitled to show loss of profits as a direct result of their paying the tenants to move out every time we moved one in.

MR. COOPER: Your Honor, I am familiar with this case and if you read it closer it talks about loss of access and claiming for loss of profits in a case where a road is being constructed. In our case, as of this date there has been no interference. His allegation as to the State paying tenants to move, let me say this---the policy of the State is that if there is a tenant in there he will be informed of his rights under the State Relocation Program and if he wants to move he can go to the State Highway Department and receive compensation and if he chooses to do so it is on him. I contend that no one working for the State paid them to move. Again, the policy is, if a tenant chooses to move, we are obligated to compensate that tenant for relocation. In this case they have been relocated and I contend the rule of law is the same in a partial taking as in a whole. Where there is

no invasion of a property owner's rights the State should not be obligated to pay for something they had nothing to do with. You are asking the State to subsidize a property owner when an election is made by the tenant to relocate. The State played no part in the breach of the lease and we still contend that the State should not be obligated for an election made by a tenant. Once a project is announced, should the State be obligated to pay for every tenant who elects under his rights of relocation? I contend we should not be.

THE COURT: Okay.

MR. LANDREY: In response to that, Judge, the State had no reason to pay any tenant to relocate three years ago. One of the man's property rights is to lease his property. His argument is that they just paid the tenant when the tenant voluntarily left. And I am saying I should have the right to show, and under my facts I think that I can prove, that not only was it not just a letter they sent to the tenant, but they told him that if he would vacate the premises right then, we will pay you right now. That was three years ago, Your Honor, and that's the only reason that tenant vacated.

THE COURT: Are you saying that what Tyrone says goes to the weight?

MR. LANDREY: Yes, and he cannot possibly prove that the State was contacted by a tenant, but we can show, I think, that it was the other way around. The State contacted the tenant.

MR. COOPER: Your Honor, it goes as to the admissibility, not to the weight. They are not entitled to a loss of rents and they should not be

entitled to it. If that tenant left, they could put another one in.

MR. LANDREY: Which we did and you paid him to leave, too.

MR. COOPER: They were paid for relocation.

MR. LANDREY: That's like saying you didn't interfere with someone after you enticed him with a ten dollar bill.

THE COURT: Okay.

MR. LANDREY: In other words, you paid him and I think it is an element of our damages. Keep in mind, every case he cited was a whole taking.

MR. COOPER: Well, a partial is the same.

MR. LANDREY: No, sir. Your own motion says, *incidental or consequential to the taking of entire property and for which reason the State is not liable for such consequential damages*. You cannot recover them in a whole taking.

MR. COOPER: But then I say, *there has been neither a taking nor any character of physical invasion of the property*.

MR. LANDREY: Property is not literal.

MR. COOPER: I understand that.

MR. LANDREY: It's the owner's right to use his land without the tortious interference by any entity.

MR. COOPER: And he had that right.

MR. LANDREY: He had the right, but you interferred with it prior to the taking.

THE COURT: Are you both through?

MR. COOPER: Yes.

MR. LANDREY: Yes.

THE COURT: This is off the record.

(WHEREUPON A DISCUSSION WAS HAD OFF THE RECORD.)

THE COURT: It is the opinion of the Court that with respect to loss of rental that the property owner is not entitled to recover for loss of rental. The Court thinks variances as to causes does not change the rule and the Court sustains the Motion in Limine.

(REPORTER'S NOTE: Whereupon, the proceedings resumed in Court as follows.)

THE COURT: Good morning, ladies and gentlemen. I am Al Gerson, the Judge of this Court. This is the County Court at Law and I want to apologize to you for keeping you around so long. We've had a heavy docket here this morning and everything else went wrong so please just bear with us and accept my apologizies. You've already met Mr. Stelly, I guess, and this is Miss Schofield, our court reporter. I'll get to these lawyers in a little bit, but first, let me tell you that we appreciate your being with us here today. We particularly appreciate your response to our call for your civic service and it's responsible citizens like you who come down here, because there are probably a lot of other things you would rather do

than be here, and I can understand that. Now, to acquaint you a little bit with what we call the

APPENDIX B-1

NO. 09-85-00246-CV

IN THE
COURT OF CIVIL APPEALS
FOR THE
NINTH SUPREME JUDICIAL DISTRICT OF TEXAS
BEAUMONT, TEXAS

CHARLES D. TRAVIS, ET UX AND
WILLIAM V. TRAVIS, ET UX, Appellants
VS.
THE STATE OF TEXAS, ET AL, Appellees

Appeal from the County Court at Law of
Jefferson County, Texas
Honorable Alfred S. Gerson, Presiding

BRIEF FOR APPELLANTS

MOORE, LANDREY,
GARTH & JONES
BRACK JONES, JR.
FLOYD A. LANDREY
285 Liberty, Suite 1900
Beaumont, Texas 77701
(409) 835-3891
ATTORNEYS FOR
APPELLANTS

APPENDIX B-2

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APPENDIX B-3

LIST OF PARTIES

The names of all parties to this litigation are:

1. The State of Texas and the City of Beaumont; and

2. Charles D. Travis, et ux and William V. Travis, et ux

APPENDIX B-4

LIST OF AUTHORITIES

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City of La Grange vs. Pieratt, et ux (Tex. 1943).....	6,7
Mayberry vs. Pedernales Electric Cooperative, 268 SW 2d 493 (Tex. Civ. App. - 1973).....	3
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APPENDIX B-5

NO. 09-85-00246-CV

IN THE
COURT OF CIVIL APPEALS
FOR THE
NINTH SUPREME JUDICIAL DISTRICT OF TEXAS
BEAUMONT, TEXAS

CHARLES D. TRAVIS, ET UX AND
WILLIAM V. TRAVIS, ET UX, Appellants
VS.
THE STATE OF TEXAS, ET AL, Appellees

Appeal from the County Court at Law of
Jefferson County, Texas
Honorable Alfred S. Gerson, Presiding

BRIEF FOR APPELLANTS

TO THE HONORABLE JUDGE OF SAID COURT:

Appellants, CHARLES D. TRAVIS, ET UX and WILLIAM V. TRAVIS, ET UX, hereinafter called *Owners*, respectfully file this their Brief on appeal of the above entitled and numbered cause. Owners/Appellants are appealing an unfavorable judgment rendered against them in favor of Appellees, the State of Texas and the City of Beaumont, Texas, hereinafter called the *State*.

APPENDIX B-6

A. *STATEMENT OF THE NATURE OF THE CASE*

This is a condemnation case wherein the State, Plaintiffs, recovered fee title and possession to a tract of land (See TR P-42 for property description.) located in Beaumont, Texas, and certain buildings thereon from Owners for the purposes of widening State Highway Spur 380. Owners' property was located on the North side of Railroad Avenue at the intersection of Washington Avenue. The condemnation was a partial taking of the real property, a whole taking of two (2) buildings and a partial taking of a third building. A visual portrait of the taking is reflected in (DX-2, SF P-462). Approximately twenty-five (25) feet (SF-67) on the street side of Owners' property was taken and all of Building #1 (wherein Owners conducted their family business) and Building #3 (which was used for storage); however, only approximately 2.4 to 2.6 feet of Owners' Building #2 (DX-2, SF P-462) was taken. At times material to this suit, Building #2 was utilized by a lessee as a business.

The date of taking of the property by the State is October 28, 1983 (TR P-17-18).

The Special Commissioners awarded $160,000.00 for the Owners' land (TR P-12). The State filed objections and exceptions to the Commissioners' award (TR P-15) followed by trial to a jury in the County Court at Law of Jefferson County followed by Owners' appeal from that jury finding.

B. *POINT OF ERROR NUMBER ONE*

Entry of judgment by the Court was error in that the State failed to prove jurisdiction.

C. *POINT OF ERROR NUMBER TWO*

The Court erred in excluding evidence of *lost rent income* (occasioned by the government's action in relocating Owners' tenant prior to the date of taking) as an element of damages to the landowners' remaining land.

BRIEF OF THE ARGUMENT

***POINT OF ERROR NUMBER ONE*: Entry of judgment by the Court was in error in that the State failed to prove jurisdiction.**

To establish jurisdiction in an eminent domain proceeding, the condemnor must prove that it has the right to condemn the land in question. See *Ready v. Marshall*, 234 SW 2d 104 (Tex. Civ. App., 1950), *Miers v. Housing Authority of City of Dallas*, 266 SW 2d 842 (Tex., 1954) and *Mayberry v. Pedernales Electric Cooperative*, 268 SW 2d 493 (Tex. Civ. App., 1973). The Court stated in *Mayberry, supra*:

> **"The record does not disclose that appellant admitted or that the parties stipulated that there existed a necessity for taking of appellant's property by Pedernales Electric, or that the condemnor has taken all steps required to effect a lawful taking. Appellant has not accepted the award of the commissioners or the money deposited by Pedernales Electric pursuant to the award or in conformity with the judgment of the Court. Appellant therefore has not waived her right to challenge jurisdiction of the Court and has not consented to the taking."**

Acceptance of the Special Commissioners' award precludes a party from contesting the State's right to take property. A further discussion of condemnation and jurisdiction is reflected in *State v. Jackson*, 388 SW 2d 924 (Tex., 1965). Although the Supreme Court reversed the case (383 SW 2d 648, Tex. Civ. App., 1964), it is distinguishable from the facts presented herein. In *State v. Jackson*, the landowner was precluded form contesting jurisdiction because at trial the State proved jurisdiction and the award of the Special Commissioners had been deposited and withdrawn by the landowner.

The record herein does not disclose that the owners admitted the right of the State to take their property, nor that the parties stipulated that the State had taken all steps necessary to effect a lawful taking. There is no evidence in the record that the Owners withdrew the award of the Commissioners or the money deposited by the State, or in conformity, with the judgment of the Court. Thus, the Owners have not waived their right to challenge jurisdiction; accordingly, the Court had no jurisdiction to proceed to judgment in that no evidence was presented on this point.

POINT OF ERROR NUMBER TWO: The Court erred in excluding evidence of *lost rent income* (occasioned by the government's action in relocating Owners' tenant prior to the date of taking) as an element of damages to the land owners' remaining land.

Recalling this is a partial taking of Owners' land, the discussion herein centers around Building #2. 2.4 feet to 2.6 feet of that building was taken. (SF P-67). Essentially, the front wall and awning

of the building which was being used by a lessee as a motorcycle shop were involved.

Owners complain that PRIOR (emphasis added) to the date of taking (October 28, 1983), the State contacted the lessee of Building #2 and eventually relocated the lessee. In 1980, Dwain Markham rented Building #2 from Owners (Travis Brothers Hardware). His business was a licensed dealer of Harley-Davidson motorcycles. In 1980, he was contacted by a representative of the State concerning relocation of his business (SF 419 P-420). The State paid his relocation expenses (SF P-420) (SF P-423). Markham was told by a State Representative if he moved then or soon, he would receive relocation assistance. If he waited until the property was condemned, he would not qualify for relocation expenses (SF P-423). He did not contact the State (SF P-423) and the first he knew of the relocation program was from the State Representative (SF P-424).

State witness, Lynwood Walters, the relocation agent, verifies the above facts in his testimony (beginning SF P-428) and indicates he had many discussions with the lessee, Markham, about relocation prior to the date of taking (SF P-432).

Markham purchased the motorcycle dealership in 1980 and the building lease expired in 1980. Markham had agreed to remain in the building for the remainder of the lease and then renegotiate the lease (SF P-426).

Prior to jury selection, the Court sustained the State's Motion in Limine, excluding Owners' evidence relating to lost rental income. (TR P-22).

By Bill of Exceptions, Owners' evidence relating to the lost rental income was tendered and overruled by the Court. (See Supplemental SF P-2 and 3.) William Travis, Owner, testified he lost $1,000.00 per month for 29 months ($33,450.00, with interest) as a result of the State's contacting and relocating his tenants prior to the date of taking (October 28, 1983). The jury should have been permitted to hear this evidence.

Again, it must be emphasized the law distinguishes condemnation of the whole of a tract of land from that where there is only a partial taking. Here, part of Building #2 and a *part* of the real estate was taken. Unquestionably, the State, *PRIOR* (emphasis added) to the date of taking, invaded Owners' property, had conversation with Owners' tenant and in fact, relocated Owners' tenant (i.e., a physical invasion of Owners' property).

In *City of La Grange v. Pieratt, et ux* (Tex., 1943), the Court discussed recovery of lost rentals in a partial taking as follows:

> "A right of recovery is established by proof of injury to some right of property, and the damages are measured by the extent of the injury to that right. Thus, a business is property, and the reasonable damages for interference with the access to business property may be measured * * * by the loss of profits."
>
> ". . . where a part of a tract of land is condemned for street or road purposes, and the owner claims consequential damages to the land left on account of the loss of profits arising from an established business being

conducted thereon while the road or street improvements are in progress, such claim may and should be presented at the condemnation proceeding if it is of a nature that it could reasonably have been foreseen and determined at the time."

"It is the law that where a breach of a contract or a tort results in damages to an established business, in the form of loss of profits, which would have been derived therefrom absent such breach of contract or tort, the owner of such business may recover damages from the party causing such loss, measured by the amount of such loss of profits. . . . We have already shown that the same rule applies in condemnation proceedings. In such proceedings, an established business is property, and damages thereto in the form of loss of profits should be taken into consideration in such proceedings."

"Profits which would have been earned by an established business, absent any interference therewith, are in their very nature more or less conjectural, uncertain and speculative, but this does not deprive the party injured by such interference of his right to recover. In other words, the difficulties which may lie in the way of making proof will not defeat a recovery. It is not necessary that damages in the form of loss of profits should be susceptible of exact calculation. All that is required is that they be ascertained with a reasonable degree of certainty."

The *La Grange* case, supra, is a partial taking, lost rent fact situation. *La Grange* appears to be a *post* (emphasis added) date of taking fact

situation; however, it is felt the principles of law therein governs this set of facts, to wit: In a partial taking of land, evidence of loss of rental income prior to the date of taking by the State are admissible as an element of damages.

Without the presentation of evidence of Owners' lost rent, the judgment resulted in an unreasonable and unjust award, and in effect, constituted the taking of Appellants' property without adequate compensation.[1]

PRAYER FOR RELIEF

WHEREFORE, premises, arguments and authorities considered, Appellants, Charles D. Travis, et ux and William V. Travis, et ux, pray that this Honorable Court:

---

[1]It is contemplated the State will cite *State vs. Vaughan*, 319 SW 2d 349 (Tex. Civ. App. - Austin, 1959, no writ) as authority for the proposition that the State is not liable for lost rental occasioned an owner resulting from a tenant vacating the property voluntarily, having heard of the condemnation. That case is to be distinguished from the facts herein in that *State vs. Vaughan*, supra (a) is a whole taking of property and (b) no physical invasion by the State occurred.

APPENDIX B-13

1. Reverse and remand for re-trial.

Respectfully submitted,

MOORE, LANDREY,
GARTH & JONES
285 Liberty, Suite 1900
Beaumont, Texas 77701
(409) 835-3891

BY: _____
BRACK JONES, JR.
State Bar No. 10975000

BY: _____
FLOYD A. LANDREY
State Bar No. 11866000

CERTIFICATE OF SERVICE

I hereby certify that on this the 18th day of December, 1985, a true and correct copy of the above and foregoing Brief for Appellant was served on Tyrone Cooper, City Attorney's Office, Beaumont, Texas.

BY: _____
BRACK JONES, JR.

APPENDIX C-1

46969

STATE OF TEXAS, ET AL	IN THE COUNTY COURT
VS.	AT LAW NUMBER ONE OF
CHARLES D. TRAVIS, ET UX	JEFFERSON COUNTY, TEXAS

SUPPLEMENTAL STATEMENT OF FACTS

APPEARANCES:

FOR THE PLAINTIFF:

Hon. Tyrone Cooper
Attorney at Law
801 Main Street
Beaumont, Texas 77701

FOR THE DEFENDANTS:

Hon. Floyd Landrey
Attorney at Law
285 Liberty, Suite 1900
Beaumont, Texas 77701

BE IT REMEMBERED that the above cause came on for trial on July 1, 1985, before the Honorable Alfred S. Gerson, Judge presiding in the County Court at Law No. One of Jefferson County, Texas, and at 12:15 p.m. on July 3, 1985, by agreement to perfect this Bill of Exception at said time and out of the presence of the jury, the following proceedings were had:

APPENDIX C-2

BILL OF EXCEPTION

MR. LANDREY: Comes now the Defendant in the above cause and in response to a Motion in Limine granted by the Court prior to trial herenow submits evidence in relation thereto.

WILLIAM V. TRAVIS,

having been called as a witness by the Defendants, and having been previously duly sworn by the Court, testified as follows:

QUESTIONS BY MR. LANDREY:

Q State your name, please.

A William V. Travis.

Q You are one of the Defendants in this cause, is that right?

A Yes, sir.

Q Mr. Travis, are you familiar with the fact that the State, through their representatives, contacted tenants of yours prior to October 28, 1983?

A Yes, sir.

Q And in contacting those tenants and as a direct result of offering them relocation assistance, did you lose the tenants?

A Yes, sir.

THE COURT: Wait just a minute, Mr. Landrey.

(REPORTER'S NOTE: Whereupon, a discussion was had off the record.)

THE COURT: Proceed, Mr. Landrey.

Q And did you lose the tenants as a result of the relocation assistance?

A Yes, sir.

Q And as a result of the loss of those tenants from the contact of the State prior to the date of taking, do you have an opinion of how much rent you actually lost?

A Yes, sir.

Q And would you state how many months?

A Twenty-nine months at a thousand dollars a month, sir.

Q For a total of?

A With the interest, as of that date was $33,450.00, sir.

Q And at what interest rate is that?

A Twelve per cent, sir.

MR. LANDREY: Your Honor, I would tender that evidence at this time.

THE COURT: All right. It's overruled.

COURT REPORTER'S CERTIFICATE

I, Cindy J. Schofield, Official Court Reporter in and for the County Court at Law No. One of

Jefferson County, Texas, do hereby certify that the above and foregoing contains a true and correct transcription of the Bill of Exceptions in the above styled and numbered cause, which occurred in open court and was reported by me.

Cindy J. Schofield
Certified Shorthand
Reporter
Certificate No. 473
Expires: 12-13-86

APPENDIX D-1

NO. C-5588

IN THE SUPREME COURT
OF TEXAS

* *

THE STATE OF TEXAS, ET AL
Petitioners

VS.

CHARLES D. TRAVIS, ET UX AND
WILLIAM V. TRAVIS, ET UX, Appellants
Respondents

* *

APPEALED FROM THE COURT OF CIVIL APPEALS
FOR THE NINTH SUPREME JUDICIAL DISTRICT
OF TEXAS AT BEAUMONT

* *

ANSWER OF RESPONDENT TO APPLICATION
FOR WRIT OF ERROR

* *

MOORE, LANDREY,
GARTH & JONES
BRACK JONES, JR.
FLOYD A. LANDREY
285 Liberty, Suite 1900
Beaumont, Texas 77701
(409) 835-3891

ATTORNEYS FOR
RESPONDENTS

APPENDIX D-2

LIST OF PARTIES

The following is a complete list of all parties to the action:

Plaintiffs:	The State of Texas
	The City of Beaumont
Defendants:	Charles D. Travis
	Anna Lois Travis
	William V. Travis
	Delores T. Travis

APPENDIX D-3

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APPENDIX D-4

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APPENDIX D-5

REPLY TO STATEMENT OF JURISDICTION

Respondents deny that the Supreme Court has jurisdiction to allow Writ of Error in this case in that no error of substantive law affecting this case was committed by the Court of Appeals.

Respondents deny this Court has jurisdiction of this suit under Subdivision 4 (a case involving a state revenue) and/or Subdivision 5 (a case in which the Railroad Commission is a party) of the Government Code of the Revised Civil Statutes.

REQUEST FOR ORAL ARGUMENT

In the event that the Court grants Petitioners' Application for Writ of Error, Respondents respectfully request the opportunity to orally argue said cause before the Supreme Court.

APPENDIX D-6

NO. C-5588

IN THE SUPREME COURT

OF TEXAS

* *

THE STATE OF TEXAS, ET AL

Petitioners

VS.

CHARLES D. TRAVIS, ET UX AND
WILLIAM V. TRAVIS, ET UX, Appellants

Respondents

* *

ANSWER OF RESPONDENTS TO APPLICATION FOR WRIT OF ERROR

TO THE SUPREME COURT OF TEXAS:

Respondents, CHARLES D. TRAVIS, ET UX and WILLIAM V. TRAVIS, ET UX, Appellants in Cause No. 09-85-00246-CV in the Court of Appeals for the Ninth Supreme Judicial District of Texas, Beaumont, Texas (and Defendants in the County Court below), respectfully submit this Brief in support of its position in the instant case, wherein the Court of Civil Appeals reversed and remanded the Judgment of the Trial Court in favor of Appellants/Respondents herein.

For purposes of clarity, the State of Texas and the City of Beaumont will be referred to as *Petitioners* and Charles D. Travis, et ux, and

William V. Travis, et ux, will be referred to as *Respondents*.

STATEMENT OF THE NATURE OF THE CASE

The opinion of the Court of Civil Appeals correctly states the nature and result of the case. The condemnation involved a partial taking, rather than a total taking of real property.

REPLY POINT OF ERROR

THE COURT OF CIVIL APPEALS CORRECTLY DECIDED IT WAS ERROR TO EXCLUDE EVIDENCE OF LOST RENTAL INCOME (OCCASIONED BY THE GOVERNMENT'S/PETITIONERS' ACTION IN RELOCATING OWNERS'/RESPONDENTS' LESSEE PRIOR TO THE DATE OF TAKING) AS AN ELEMENT OF DAMAGES TO OWNERS/RESPONDENTS REMAINING PROPERTY.

BRIEF OF THE ARGUMENT

REPLY POINT OF ERROR (RESTATED)

THE COURT OF CIVIL APPEALS CORRECTLY DECIDED IT WAS ERROR TO EXCLUDE EVIDENCE OF LOST RENTAL INCOME (OCCASIONED BY THE GOVERNMENT'S/PETITIONERS' ACTION IN RELOCATING OWNERS'/RESPONDENTS' LESSEE PRIOR TO THE DATE OF TAKING) AS AN ELEMENT OF DAMAGES TO OWNERS/RESPONDENTS REMAINING PROPERTY.

Petitioners recovered fee title and possession to a tract of land (See TR P-42 for property description) located in Beaumont, Texas, and certain buildings thereon from Owners/Respondents for the purposes of widening State Highway Spur 380. The condemnation was a partial taking of the

real property, a whole taking of two (2) buildings and a partial taking of a third building. (A visual portrait of the taking is reflected in (DX-2, SF P-462). Approximately twenty-five (25) feet (SF-67) on the street side of Owners'/Respondents' property was taken and all of Building #1 (wherein Owners/Respondents conducted their family business) and Building #3 (which was used for storage); however, only approximately 2.4 feet to 2.6 feet of Owners' Building #2 (DX-2, SF P-462) was taken. At times material to this suit, Building #2 was utilized by a Lessee as a business.

The date of taking of the property by the State/Petitions is October 28, 1983 (TR P-17-18).

Recalling this is a partial taking of Owners'/Respondent' land, the discussion herein centers around Building #2. 2.4 feet to 2.6 feet of Respondents' building was taken (SF P-67). Essentially, the front wall and awning of the building which was being used by a Lessee as a motorcycle shop were involved.

Owners/Respondents complain that PRIOR (emphasis added) to the date of taking (October 28, 1983), the State contacted the Lessee of Building #2 and eventually relocated the Lessee. In 1980, Dwain Markham/Lessee rented Building #2 from Owners/Respondents. Lessee was a licensed dealer of Harley-Davidson motorcycles. In 1980, Lessee was contacted by a representative of the State concerning relocation of his business (SF 419 P-420). The State paid Lessee his relocation expenses (SF P-420) (SF P-423). Markham/Lessee was told by a State Representative if he moved then or soon, he would receive relocation assistance. If Lessee waited until the property was condemned, he would not qualify for relocation expenses (SF P-423). Lessee did not contact the State

(SF P-423) and the first Lessee knew of the relocation program was from the State Representative (SF P-424).

State witness, Lynwood Walters, the relocation agent, verifies the above facts in his testimony (beginning SF P-428) and indicates he had many discussions with the Lessee, Markham, about relocation prior to the date of taking (SF P-432).

Prior to jury selection, the Trial Court sustained the State's/Petitioners' Motion in Limine, excluding Owners'/Respondents' evidence relating to lost rental income. (TR P-22).

By Bill of Exceptions, Owners' evidence at trial relating to the lost rental income was tendered and overruled by the Court. (See Supplemental SF P-2 and 3.) William Travis, Owner, testified he lost $1,000.00 per month for 29 months ($33,450.00, with interest) as a result of the State's contacting and relocating his tenants prior to the date of taking (October 28, 1983). The jury should have been permitted to hear this evidence.

It must be emphasized the law distinguishes condemnation of the whole of a tract of land from that where there is only a partial taking. Here, *part* of Building #2 and a *part* of the real estate was taken. Unquestionably, the State, PRIOR (emphasis added) to the date of taking, invaded Owners' property, had conversation with Owners' tenant and in fact, relocated Owners' tenant (i.e., a physical invasion of Owners' property).

In *City of La Grange v. Pieratt, et ux*, 175 S.W.2d 243 (Tex., 1943), the Court discussed recovery of lost rentals in a partial taking, as follows:

"A right of recovery is established by proof of injury to some right of property, and the damages are measured by the extent of the injury to that right. Thus, a business is property, and the reasonable damages for interference with the access to business property may be measured * * * by the loss of profits."

". . . where a part of a tract of land is condemned for street or road purposes, and the owner claims consequential damages to the land left on account of the loss of profits arising from an established business being conducted thereon while the road or street improvements are in progress, such claim may and should be presented at the condemnation proceeding if it is of a nature that it could reasonably have been foreseen and determined at the time."

"It is the law that where a breach of a contract or a tort results in damages to an established business, in the form of loss of profits, which would have been derived therefrom absent such breach of contract or tort, the owner of such business may recover damages from the party causing such loss, measured by the amount of such loss of profits. . . . We have already shown that the same rule applies in condemnation proceedings. In such proceedings, an established business is property, and damages thereto in the form of loss of profits should be taken into consideration in such proceedings."

"Profits which would have been earned by an established business, absent any interference therewith, are in their very nature more or less conjectural, uncertain and speculative,

> but this does not deprive the party injured by such interference of his right to recover. In other words, the difficulties which may lie in the way of making proof will not defeat a recovery. It is not necessary that damages in the form of loss of profits should be susceptible of exact calculation. All that is required is that they be ascertained with a reasonable degree of certainty."

The *La Grange* case, *supra*, is a partial taking, lost rent fact situation. *La Grange* appears to be a *post* (emphasis added) date of taking fact situation; however, it is felt the principles of law therein governs this set of facts, to wit: In a partial taking of land, evidence of loss of rental income prior to the date of taking by the State are admissible as an element of damages.

Without the presentation of evidence of Owners' lost rent, the judgment resulted in an unreasonable and unjust award, and in effect, constituted the taking of Appellants' property without adequate compensation.[1]

PRAYER FOR RELIEF

---

[1]Petitioners cite *State vs. Vaughan*, 319 SW 2d 349 (Tex. Civ. App. - Austin, 1959, no writ) as authority for the proposition that the State is not liable for lost rental occasioned an owner resulting from a tenant vacating the property voluntarily, having heard of the condemnation. That case is to be distinguished from the facts herein in that *State vs. Vaughan, supra*(a) is a whole taking of property and (b) no physical invasion by the State occurred.

For the reasons stated, Respondents respectfully submit this Application for Writ of Error should be refused in that the Application presents no error which requires reversal.

Respectfully submitted,

MOORE, LANDREY,
GARTH & JONES
285 Liberty, Suite 1900
Beaumont, Texas 77701
(409) 835-3891

BY:_____
BRACK JONES, JR.
State Bar No. 10975000

BY:_____
FLOYD A. LANDREY
State Bar No. 11866000

CERTIFICATE OF SERVICE

I hereby certify that on this the 11th day of August, 1986, a true and correct copy of the above and foregoing Answer in Response to Petitioners' Application for Writ of Error was served on Tyrone Cooper, City Attorney's Office, Beaumont, Texas.

BY:_____
BRACK JONES, JR.

APPENDIX E-1

NO. C-5588

IN THE SUPREME COURT
OF TEXAS

* *

THE STATE OF TEXAS, ET AL
Petitioners

VS.

CHARLES D. TRAVIS, ET UX AND
WILLIAM V. TRAVIS, ET UX, Appellants
Respondents

* *

APPEALED FROM THE COURT OF CIVIL APPEALS
FOR THE NINTH SUPREME JUDICIAL DISTRICT
OF TEXAS AT BEAUMONT

* *

MOTION FOR REHEARING

* *

MOORE, LANDREY,
GARTH & JONES
BRACK JONES, JR.
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ATTORNEYS FOR
RESPONDENTS

APPENDIX E-2

LIST OF ATTORNEYS OF RECORD FOR THE PARTIES

1. The State of Texas and the City of Beaumont:

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Assistant City Attorney
City of Beaumont
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(409) 838-0761
ATTORNEY FOR PETITIONERS

Charles D. Travis, et ux and William V. Travis, et ux:

BRACK JONES, JR.
FLOYD A. LANDREY
Moore, Landrey, Garth & Jones
285 Liberty, Suite 1900
Beaumont, Texas 77701
(409) 835-3891
ATTORNEYS FOR RESPONDENTS

2. Amicus Curiae Brief filed by:

JIM MATTOX
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APPENDIX E-4

NO. C-5588

IN THE SUPREME COURT OF TEXAS

* *

THE STATE OF TEXAS, ET AL

Petitioners

VS.

CHARLES D. TRAVIS, ET UX AND
WILLIAM V. TRAVIS, ET UX

Respondents

* *

MOTION FOR REHEARING

TO THE HONORABLE SUPREME COURT OF TEXAS:

CHARLES D. TRAVIS, ET UX and WILLIAM V. TRAVIS, ET UX, Respondents/Landowners in this cause, make this Motion for a rehearing of the decision of the Court rendered on January 14, 1987, and show:

I.

POINT OF ERROR NUMBER ONE

THIS COURT ERRED WHEN IT HELD LOST BUSINESS PROFITS ARE NOT RECOVERABLE AS A SEPARATE ITEM OF DAMAGES OVER AND ABOVE THE FAIR MARKET VALUE OF LAND TAKEN AND THE DAMAGES OCCASIONED TO THE REMAINDER BY REASON OF THE TAKING.

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ARGUMENT AND AUTHORITIES

First, Petitioners' argument as to lost profits as a *separate item of damage* was FIRST advanced in its Supplemental Application for Writ of Error. Neither this argument nor the *City of Dallas v. Prioli*, 242 S.W.2d 176 (Tex. 1951) was raised, cited or argued in the record or in the Court of Appeals. Respondents suggest such theory should not now be considered for the first time at this level. Also, in that the State of Texas was a party to the original proceeding, Respondents fail to see why the Attorney General can now, as a party, file an Amicus Curiae Brief.

Second, on appeal, Respondents/Landowners Point of Error Number Two (Brief for Appellants, Pg. 3) stated:

> "THE COURT ERRED IN EXCLUDING EVIDENCE OF LOST RENT INCOME (OCCASIONED BY THE GOVERNMENT'S ACTION IN RELOCATING OWNERS' TENANT PRIOR TO THE DATE OF TAKING) AS AN ELEMENT OF DAMAGES TO THE LANDOWNERS' REMAINING LAND."

Respondents disagree that their evidence offer of lost rental income was strictly tendered as a separate item of damage. The assigned error suggests such evidence should have been presented to and considered by the jury in awarding just compensation. The record does not reflect Respondents' evidence was submitted solely as a separate item of damages. Any consideration by the jury of such evidence could have been limited by a jury instruction or by the manner in which the damage issue was submitted.

Evidence of lost profits (here rental income) may be admitted as bearing upon the value of the land taken or the diminution in value of the remainder. *City of LaGrange vs. Pieratt*, 175 S.W.2d 243 (Tex. 1943), *City of Dallas vs. Prioli*, 242 S.W.2d 176 (Tex. 1951). The Ninth Court of Appeals, in its opinion, stated:

> "We must recall that this is a partial taking of the Owners' land and partial taking of a certain building. The record before us shows that this element of lost rental income, which resulted from the government relocating a certain tenant of Owners, prematurely, at least raised the issue of how much rental loss the Owners sustained. From the Bill of Exception, it is shown that 29 months, at $1,000.00 per month, was raised by the excluded evidence, together with interest amounting to $33,450.00."

> "By means of a State's Motion in Limine, prior to the jury selection, the Court, by its ruling on said Motion, excluded the Owners' evidence relating to the lost rental income. A proper Bill of Exception was developed and tendered on the lost rental income and was tendered to the Court and overruled by the Court. We determine that the jury should have been permitted to hear this evidence."

Respondents believe the Trial Court's exclusion of such evidence prevented the jury from considering evidence which was admissable as to the value of the land taken or the diminished value of the remainder.

Third, Respondents' evidence showed the State contacted the Lessee and in fact, relocated the Lessee *prior* to the date of taking. The State paid

most of Lessee's relocation expenses and assisted Lessee in moving. These acts constituted a physical invasion of Respondents' property, if not an actual appropriation of the property. *State vs. Vaughn*, 319 S.W.2d 349 (Tex. Civ. App. - Austin, 1959, no writ history), *Webb vs. Dameron*, 219 S.W.2d 581 (Tex. Civ. App. - Amarillo, Er. ref., n.r.e.). In *City of LaGrange v. Pieratt*, 142 Tex. 23, 175 S.W.2d 243 (1943) the Court stated "...thus a business is property, and the reasonable damages for interference with the access to business property may be measured * * * by the lost profits..." The entry on Respondents' land and removal of the Lessee was an interference and accordingly, evidence of Respondents' lost rental income should have been submitted to the fact finder for its determination of just compensation.

Respondents' excluded trial evidence as to lost rental income occurred *prior* to the date of taking. This fact differs from most cases reviewed. Generally, a landowner seeks recovery for lost revenue at and/or after the date of taking. In those situations, this Court has held lost business profits are not recoverable as a separate damage item. Accordingly, Respondents believe based upon their pre-date of taking loss and the pre-date of taking invasion (removal of Lessee), that this case is distinguishable from others and this Court's prior rulings.

Hypothetically, what if the State, under the instant facts, had prior to the withdrawal by Landowners of the commissioner's award for damages or prior to entry of the judgment, if no commissioner's award was tendered, dismissed its condemnation proceeding? Certainly, if the State had dismissed the proceeding, the State's entry upon Respondents' land and the removal of the tenant was an invasion and/or tort which resulted

in damage to an established business and for which the landlord could have sought recovery. *City of LaGrange, supra,* and 28 Tex. Jur. p. 215, and authorities there cited. Accordingly, Respondents' lost rental damages should have gone before the jury for their consideration.

Respondents suggest the true issue for this Court's decision to be as follows:

> MAY EVIDENCE OF LANDOWNERS' LOST RENTAL INCOME OCCASIONED *PRIOR* TO THE DATE OF TAKING BE SUBMITTED TO THE FACT FINDER ON THE ISSUE OF JUST COMPENSATION?

This Court's judgment appears to permit a condemnor to remove a landowners' lessee, prior to any legal obligation on condemnor's part, with immunity from lost rental or other damages resulting therefrom.

In this case, without the jury's consideration of Landowners' lost rental income, the judgment constitutes the taking of Respondents' property without adequate compensation.

PRAYER

WHEREFORE, Respondents request that the Court grant this Motion for Rehearing and that upon final rehearing, the judgment of the Court of Appeals be affirmed.

Respectfully submitted,

MOORE, LANDREY,
GARTH & JONES

BY: _____

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ATTORNEYS FOR
RESPONDENTS

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CERTIFICATE OF SERVICE

This is certify that a true and correct copy of the above and foregoing Motion for Rehearing has this day been sent to each of the attorneys of record, as follows:

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SIGNED this 28th day of January, 1987.

_____

BRACK JONES, JR.